



Legal Analysis on the Relationship between the AU / AEC and RECs:
Africa Lost in a “Spaghetti Bowl” of Legal Relations?

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Barbara Kolbeck

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Abbreviations

ACHPR	African Court on Human and Peoples' Rights
ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
ACP countries	African Caribbean and Pacific countries
AEC	African Economic Community
AMU	Arab Maghreb Union
ARIA	Assessing Regional Integration in Africa
AU	African Union
AUC	African Union Commission
CAAU	Constitutive Act of the African Union
CARIFORUM	Caribbean Forum
CEMAC	Central Africa
CEN-SAD	Community of Sahel-Saharan States
CFTA	Continental Free Trade Area
COMAI	Conference of African Ministers in Charge of Integration
COMESA	Common Market for Eastern and Southern Africa
CU	Customs Union
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
EAC	East African Community
EBA	Everything but Arms Arrangement
EC	European Communities
ECCAS	Economic Community of Central African States
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EPA	Economic Partnership Agreement
ESA	East and Southern Africa
EU	European Union
FTA	Free Trade Area

GSP	Generalised System of Preferences
IGAD	Intergovernmental Authority for Development
LDC	Least Developed Country
NAFTA	North Atlantic Free Trade Area
OAU	Organisation of African Unity
PAP	Pan-African Parliament
REC	Regional Economic Community
RTA	Regional Trade Agreement
SADC	Southern African Development Community
TFEU	Treaty on the Functioning of the European Union
UEMOA	Union Économique et Monétaire Ouest Africaine
UNECA	United Nations Economic Commission for Africa
UMA	Union du Maghreb Arabe
WTO	World Trade Organisation

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Chapter 1: Introduction to Regional Integration on the African Continent and Problem Statement

1.1 Background of the Study

While the Doha round is paralyzed, regional alternatives to the multilateral trading system of the World Trade Organization (WTO) are springing up.¹ The Doha round of negotiations launched by the WTO trade ministers in Doha, Qatar, in November 2001 was very ambitious. It was aimed at redressing the feeling of unfinished business and broken promises from the Uruguay round, as many developing and least developed countries believed that they had been cheated in the negotiations and the implementation of the commitments.² The Doha round, also known semi-officially as the Doha Development Agenda (DDA), was set up to improve the trading prospects of developing countries and to address the problems they experience in implementing the current WTO agreements.³

The Doha round was ultimately often compared to a paralysed patient, not yet dead, but in a coma, dependent on life support. Attempts to resuscitate seemed to be ineffective and less and less appealing as well.⁴ The original deadline of the Doha negotiations, which was the 1st of January 2005, as well as the following unofficial targets, were all missed. It was formally declared at an impasse during the last WTO ministerial conference in Geneva in December 2011.⁵ The only hope left was that “a small package of deliverables from the Doha round of negotiations”⁶ would be concluded by the end of 2013 at the ninth ministerial conference in Bali, under the new Brazilian Director-General Roberto Azevêdo. Indeed, the WTO's Bali Ministerial

¹ Goodbye Doha, hello Bali. 2012, September 8. *The Economist*. Available: <http://www.economist.com/node/21562196>. [2013, December 20].

² Buckley, R. B. 2003. “Introduction: The Changing Face of World Trade and the Greatest Challenge Facing the WTO and the World Today” in: Buckley, R. B. (ed). *The WTO and the Doha Round: The Changing Face of World Trade*. The Hague, The Netherlands: Kluwer Law International. At 1 and 2.

³ WTO. 2011. *Understanding the WTO*. 5th edition. Geneva, Switzerland: WTO. At 77.

⁴ Sileitsch, H. 2013, Februar 13. Doha-Runde liegt im Dauerkoma. *Wiener Zeitung*. Available: http://www.wienerzeitung.at/nachrichten/wirtschaft/international/524404_Doha-Runde-liegt-im-Dauerkoma.html. [2013, December 20]; Doha im Koma. WTO-Chef beklagt Stillstand. 2011, December 15. *Focus*. Available: http://www.focus.de/finanzen/news/wto-doha-im-koma-wto-chef-beklagt-stillstand_aid_694418.html. [2013, December 20].

⁵ WTO. 2011. *Understanding the WTO*. 5th edition. Geneva, Switzerland: WTO. At 77.

⁶ ICTSD. 2013. WTO Members Choose Brazil's Azevêdo as Next Director-General. *Bridges Weekly Trade News*. 17(16):1 and 3. Available: <http://ictsd.org/downloads/bridgesweekly/bridgesweekly17-16.pdf>. [2013, December 20].

Conference, concluded on the 7th of December 2013, reached an agreement – the so-called Bali Package.⁷ The Bali Package includes only a small selection of the issues from the Doha round of negotiations.⁸ The opinions concerning the impacts of the Bali breakthrough on the rest of the Doha development agenda are controversial and it remains to be seen if the Bali Deal will help to conclude the Doha round.⁹

Due to the paralysis of the multilateral trading system, more and more states, especially developing and least developed ones, did no longer believe in the benefits of the WTO as they have been neglected for years and were tired of being put off. Those states shifted from the utopian multilateral trading system approach towards the more realistic regional trading system approach. Regional cooperation, market integration, development integration, and regional integration are grouped under the umbrella term of regionalism.¹⁰ Regionalism basically means bilateral or minilateral efforts towards economic cooperation among states seeking to accomplish their collective reinsertion into the world market. Especially developing countries find it attractive to engage in regional integration and bridge the gap between their relatively weak economies and the stronger economies in a globalising world by aiming at a greater integration inside their regions and attempting at the same time to reduce trade barriers within the rest of the world.¹¹

Thus, a complex patchwork of different bilateral and regional trade agreements has been built up worldwide. As of the 10th of January 2013, some 546 notifications of regional trade agreements have been received by the WTO; of these, 354 were in

⁷ WTO. 2013. Ninth WTO Ministerial Conference. Available: <https://mc9.wto.org/>. [2013, December 20].

⁸ WTO. 2013. Days 3, 4 and 5. Round-the-Clock Consultations produce “Bali Package“. Available: http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm. [2013, December 20].

⁹ Azevêdo, R. 2013. Concluding Remarks. Closing Session. December, 7. Available: http://www.wto.org/english/thewto_e/minist_e/mc9_e/stat_e/azevedo_closing_e.pdf. [2013, December 20]; Wirjawan, G. 2013. Concluding Remarks. Closing Session. December, 7. Available: http://www.wto.org/english/thewto_e/minist_e/mc9_e/stat_e/wirjawan_closing_e.pdf. [2013, December 20]; Falletti, S. 2013. World Trade Organisation: Bali Deal unlikely to Rescue Doha Round. *Europolitics*. December, 9; De Gucht, K. 2013. “We have saved the WTO”. Speech 13/1031. December, 6. Available: http://europa.eu/rapid/press-release_SPEECH-13-1031_en.htm. [2013, December 20].

¹⁰ Lee, M. 2002. Regionalism in Africa: A Part of a Problem or a Part of a Solution. *Polis/R.C.S.P./C.P.S.R.* 9. numéro spécial. At 3.

¹¹ Van Bael, I. 1995. Comments on Sovereignty and Regionalism. *Law and Policy in International Business*. 27(4):1181.

force.¹² In this process, Africa has become the continent where the most regional trade agreements can be found.

In Africa, the regional trade agreements (RTAs) are commonly known as regional economic communities (RECs). Currently, fourteen regional economic communities operate on the African continent.¹³ However, in the quest for a more systematic approach to promoting “a strong and united Africa”¹⁴, only eight RECs were officially recognised and designated to serve as the essential building blocks towards the formation of the African Economic Community (AEC).¹⁵ Africa's continental community AEC is envisioned as the overall objective of the African regional integration process in the Abuja Treaty.

In 2002, the Organisation of African Unity (OAU) was transformed into the African Union (AU). This new organisation was established by 53 African heads of state, meaning all African states except Morocco, to express Africa's commitment towards the ultimate regional integration objective that is the formation of the AEC. The youngest African state – South Sudan – signed and ratified the Abuja Treaty on the 15th of August 2011.¹⁶ Thus, the AU represents 54 African states today. The AU is mandated to monitor the process of regional and continental integration in Africa.

Africa's integration strategy is clearly based on the use of RECs as key players for the AEC. Article 1 (d) of the Abuja Treaty provided for the creation of five RECs corresponding to the five regions on the African continent as recognized by the OAU –

¹² WTO. *Regional Trade Agreements*. Available:

http://www.wto.org/english/tratop_e/region_e/region_e.htm. [2013, December 20].

¹³ African Union. 2009. *Study for the Quantification of Regional Economic Communities Rationalisation Scenarios*. At 34. Available: [http://ea.au.int/en/sites/default/files/Rationalisation%20study%20\(English\).2.pdf](http://ea.au.int/en/sites/default/files/Rationalisation%20study%20(English).2.pdf). [2013, December 20].

¹⁴ “African Union – a United and Strong Africa“ is the African Union's slogan. Available: <http://au.int/en/>. [2013, December 20].

¹⁵ African Union. Decisions and Declarations – Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs) DOC.EX.CL/278 (IX). AU Doc. Assembly/AU/Dec. 111 – 132 (VII). Assembly of the African Union. Seventh Ordinary Session. 1 – 2 July 2006. Banjul, The Gambia. Available: http://www.au.int/en/sites/default/files/ASSEMBLY_FR_01_JULY_03_JULY_2006_AUC_SEVENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS.pdf. [2013, December 3]; Chiumya C. C. N. 2009. Regional Trade Agreements: An African perspective of Challenges for Customs Policies and Future Strategies. *World Customs Journal*. 3(2):85. Available: [http://www.worldcustomsjournal.org/media/wcj/-2009/2/WCJ_V3N2_Chiumya_\(web\).pdf](http://www.worldcustomsjournal.org/media/wcj/-2009/2/WCJ_V3N2_Chiumya_(web).pdf). [2013, December 20].

¹⁶ African Union. List of Countries which have Signed, Ratified / Acceded to the Constitutive Act of the African Union. 16.07.2012. Available: <http://www.au.int/en/sites/default/files/Constitutive%20Act%20-%20Final.pdf>. [2013, December 3].

North, West, Central, East and South. Although RECs existed in all these regions by the mid-1990s, the AEC continued to accredit more and more RECs as “building blocks”.¹⁷ Only in July 2006 did the AU decide that it will no longer recognise new RECs and that only the following eight RECs should remain recognised: CEN-SAD, COMESA, EAC, ECCAS, ECOWAS, IGAD, SADC and UMA.¹⁸ This long overdue decision was inspired by the recommendations of the first Conference of African Ministers in charge of integration (COMAI I), held on the 30th and 31st of March 2006 in Ouagadougou, Burkina Faso. The conference deliberated on the then status of integration of the African continent and agreed on the need to rationalise and harmonise the performance of the numerous African RECs with the view to accelerating the economic integration of the continent.¹⁹

In 2006, the United Nations Economic Commission for Africa (UNECA) released a report entitled “Assessing Regional Integration in Africa II – Rationalising Regional Economic Communities” (ARIA II), where the inefficiency and ineffectiveness of the African RECs are explained.²⁰ In fact, African RECs turned from being “building blocks” into “stumbling blocks”, and thus, obstacles in the path towards the establishment of a continental community.²¹ As the title of the UNECA report indicates, it is time to coordinate the different activities and programmes of RECs and establish a framework of rationalisation in order to improve their performance and their mission to form the AEC. Accordingly, a fundamental challenge in regional integration is that of strengthening the role of its intergovernmental and potential supranational

¹⁷ Mutai, K. H. (ed). 2007. *Compliance with International Trade Obligations: The Common Market for Eastern and Southern Africa*. Alphen van den Rijn, The Netherlands: Kluwer Law International. At 106.

¹⁸ African Union. Decisions and Declarations – Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs) DOC.EX.CL/278 (IX). AU Doc. Assembly/AU/Dec. 111 – 132 (VII). Assembly of the African Union. Seventh Ordinary Session. 1 – 2 July 2006. Banjul, The Gambia. Available: http://www.au.int/en/sites/default/files/ASSEMBLY_FR_01_JULY_03_JULY_2006_AUC_SEVENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS.pdf. [2013, December 3].

¹⁹ African Union. COMAI Decl. I. First Conference of African Ministers of Integration. 30 – 31 March 2006. Ouagadougou, Burkina Faso.

²⁰ United Nations Economic Commission for Africa. 2006. *Assessing Regional Integration in Africa II, Rationalising Regional Economic Communities*. At XXIV and XXV, 115 – 128. Available: <http://www.uneca.org/aria2/>. [2013, December 3].

²¹ Draper, P. 2011. *Africa's Tripartite Preferential Agreement and the PTA-WTO Coherence Debate: Yin and Yang*. Geneva, Switzerland: ICTSD. Available: <http://ictsd.org/downloads/2012/02/peter-draper-africas-tripartite-preferential-trade-agreement-and-the-pta-wto-conference-debate-yin-and-yang.pdf>. [2013, December 20].

institutions, and that of structuring and managing the different relations between and among its main actors. In the case of Africa, these main actors are the desired continental community AEC, the RECs that should facilitate its formation, the sovereign member states of the RECs as well as the political leaders and citizens, and the AU as umbrella organisation to monitor the interactions of all actors involved in the African integration process. Besides these main actors, the EU is gaining more influence on the regional integration process in Africa through the adoption of the controversially discussed Economic Partnership Agreements (EPAs).

1.2 Justification of the Study

The concept of the pursuit of sustainable development through RECs is not doubted in Africa. The Abuja Treaty proposed a gradual step-by-step approach where RECs play an important role during the first stages, but then have to lead “somehow” to one big coherent continental regional economic organisation – the overall goal of the African Economic Community. Neither the Abuja Treaty nor the Constitutive Act of the African Union (CAAU) includes concise provisions on how to establish the continental AEC. The relations between the different integration players, such as the AU, AEC and RECs, that exist now or should exist in the near future, are not defined legally. Until these “relational issues”²² are resolved, it seems difficult and even impossible to accelerate Africa's economic integration on the way towards the AEC. Thus, it is crucial for an accelerated integration process to discuss the scarce existing legal framework with its significant lacunas and develop solutions that allow filling in the legal blanks through the adoption of new treaties and amendments as well as protocols. The African continent with its multiple and overlapping RECs still looks like a “spaghetti bowl” instead of a “cannelloni”²³. Thus, the question of rationalisation is still without definite answer.

Daniel Bach poses the question: “What remains unclear is whether the AU and its member-states will undertake responsibility for a long overdue rationalisation

²² Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. New York: Cambridge University Press. At 2.

²³ Draper, P. & Halleson, D. & Alves, P. 2007. *SACU, Regional Integration and the Overlap Issue in Southern Africa: From Spaghetti to Cannelloni?* Trade Policy Report No. 17. Johannesburg, South Africa: South African Institute of International Affairs. At 7. Available: http://sarpn.org/documents/d0002411/SACU_SAIIA_Jan2007.pdf. [2013, December 20].

process, or, alternatively, if this will be the outcome of an externally-imposed process”²⁴. Put differently, it is once again all about whether African states will find an African solution for their African problem on their own, or if they only start changing under the pressure of an external power. Looking at the EPA negotiations, it seems that Africa's biggest developing and trading partner, the EU, might still be in the position of imposing its European solution on the African integration problem.

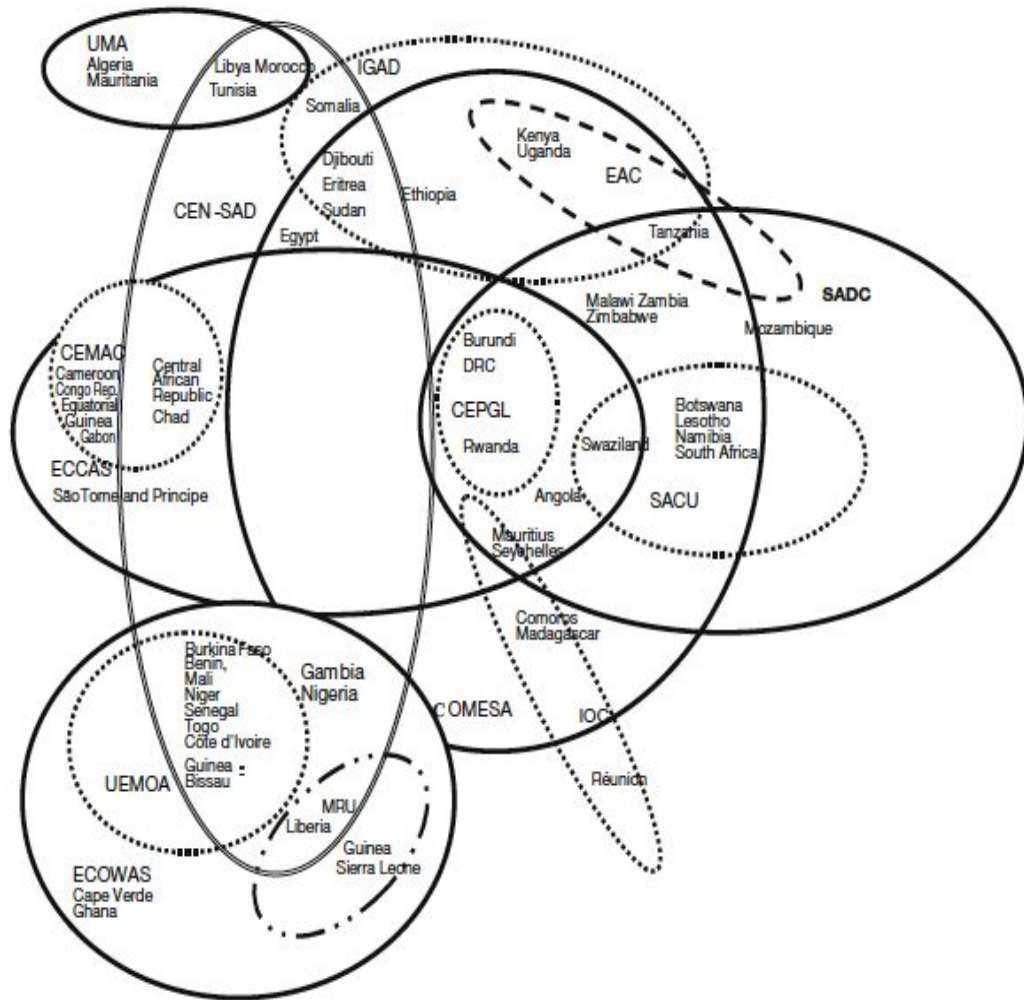
1.3 Scope of the Study

Is Africa lost in regionalism? Are the African countries lost on their continent that can be described by the famous metaphor of a “spaghetti bowl”²⁵ with many overlapping memberships and mandates? From the European perspective, the current African state of affairs with its complex regime multiplicity due to the existence of numerous RECs under the umbrella organisation AU, as shown in the following map²⁶, and the new adoption of EPAs, is confusing. It does not seem feasible to attain continental integration with the currently uncoordinated work of too many and very weak agents involved in Africa's economic integration process.

²⁴ Bach, D. 2008. “The AU and the EU” in: Akopari, J. & Ndinga-Muvumba, A. & Murithi, T. (eds). *The African Union and its Institutions*. South Africa: Fanele. At 367.

²⁵ Bhagwati, J. 1995. “U.S. Trade Policy: The Infatuation with Free Trade Areas” in: Bhagwati, J. & Krueger, A. O. (eds). *The Dangerous Drift to Preferential Trade Agreements*. Washington D.C., USA: AEI Press.

²⁶ United Nations Economic Commission for Africa. 2006. *Assessing Regional Integration in Africa II, Rationalising Regional Economic Communities*. Addis Ababa, Ethiopia: UNECA. At 51. Available: http://www.uneca.org/sites/default/files/publications/aria2_eng.pdf. [2013, December 20].



The dissertation is based on the omnipresent problem that the African economic integration process is facing: multiple and overlapping memberships of African countries in different RECs with complex relations between and among them, as well as their relations to all the other numerous integration players on the African continent. The study seeks to fill the gap in academic writing about the legal aspects of regional integration in Africa. While substantive literature regarding the political, economic and social issues of the African integration process is available, discussion on its legal framework by lawyers is rare. In this regard, the study analyses the scarce existing legal “relational framework”²⁷ and provides amendments to these provisions. Moreover, a

²⁷ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. New York: Cambridge University Press. At 2.

special chapter is dedicated to the relationship between RECs and the newly negotiated EPAs with the EU, showing Africa's regime complexity at its best. In the quest for African solutions to the African integration problem, the paper provides an in-depth study on how to strengthen the AU and the RECs and how to rationalise them in conformity with the current treaties, making them into true agents of Africa's economic integration. To close, the dissertation dares to look into the possible future of Africa's regional economic integration process.

1.4 Research Methodology

This study is literature-based. First, primary sources regarding regional integration in Africa, i. e. treaties, protocols and declarations of the African Union and the RECs, are consulted. Secondly, secondary sources are evaluated. This includes books, articles from law journals and newspapers, and publications of international and non-governmental organisations.

Finally, internet resources are used to obtain the voluminous materials of the numerous conferences and reports emanating from the African Union and the RECs, as well as some more academic articles and newspaper articles.

1.5 Structure of the Study

The Study is composed of five chapters:

Chapter 1:

Introduction to Regional Integration on the African Continent and Problem Statement

Chapter one contains an introduction to this study. It gives background information about the regional and multilateral integration of the African continent.

Chapter 2:

The History of Regional Integration in Africa and its Legal “Relational Framework”²⁸

Chapter two provides a brief discussion of the long history of regional integration on the African continent from the establishment of the OAU in 1963 to the creation of the AU in 2002.

Moreover, chapter two presents the existing normative framework for the process of regional integration in Africa as laid down in the different treaties, protocols and declarations that have been adopted over the last 50 years.

Chapter 3:

Economic Partnership Agreements between African States and the European Union: Regime Complexity at its Best

Chapter three analyses the impacts of the EPAs between the European Union (EU) and the African, Caribbean and Pacific countries (ACP countries) on Africa's regional integration process.

Chapter 4:

Recommendations: African Solutions for the current African Integration Problem

Chapter four provides African solutions to the current African integration problem.

Chapter 5:

Outlook

Chapter five presents a conclusion. It portrays an outlook on the future of Africa's RECs as well as the limitations of the study, which include issues for further research.

²⁸ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 2.

Chapter 2: The History of Regional Integration in Africa and its Legal Framework

2.1 Introduction

This chapter provides first a brief historical overview of the process of regional integration in Africa. Regional integration has a long history on the African continent. In 2013, the African Union celebrated its Golden Jubilee. The AU was established by the Constitutive Act of the AU, signed in 2000 and in force since 2002. It substituted the Organisation of African Unity that was established in 1963 to enhance continental unity and solidarity in Africa. The overview will clarify why the OAU was substituted by the AU, and how the AU's mandates and capacities are more extensive which makes the AU an “upgraded version” or a “version 2.0” of its predecessor.

Secondly, this chapter presents the existing normative framework for the process of regional integration as laid down in the different treaties, protocols and declarations. During the 50 years of African regional integration efforts, several treaties, protocols, declarations and programmes have been adopted that today count for the legal framework of this ongoing process. The presentation of the legal provisions governing regional integration in Africa analyses the legal status of Africa's key integration players, before examining in more detail the relationship – the “relational framework”²⁹ – between them. In this context, Oppong writes to the point that “an economic community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness”³⁰. What is the legal status of the RECs within the AEC, and the AEC within the AU? What is the relationship between the AU, Africa's RECs and the AEC? Is there a way “from co-existence to coherence”³¹ of the different regimes in Africa? This chapter will contribute to the clarification of these questions by examining the relevant treaties and protocols. The in-

²⁹ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. New York: Cambridge University Press. At 2.

³⁰ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. New York: Cambridge University Press. At 2.

³¹ WTO. *The WTO and Preferential Trade Agreements: From Co-existence to Coherence*. 2011. Geneva, Switzerland: WTO. The WTO also faces problems of regime multiplicity and needs to coordinate its multilateral trading regime and the different regional trade regimes worldwide. In Africa, the AU has a similar task that consists in coordinating and harmonising the different existing regimes of Africa's RECs.

depth study of the relations between the continental community AEC, the RECs, the sovereign member states and the AU as umbrella organisation will show that the current legal provisions on these relations are very scarce and incomplete. The study also demonstrates that Africa has an integration problem, mostly due to what is called regime multiplicity and “spaghetti bowl” of legal relations.

2.2 The Long History of Africa's Regional Integration in a Nutshell

Regional economic, political and social integration dominated most Pan-African development policies over the past 50 years and led to the adoption of a number of different treaties, protocols, declarations and programmes. Since decolonisation, regional integration was proclaimed as the best way to combat Africa's challenges of sustainable development and growth, poverty-reduction, and reintegration in an increasingly globalised world.³²

“Africa must unite” – these words spoken by Kwame Nkrumah in the Ethiopian capital Addis Ababa on the 24th of May 1963, during the meeting of 32 independent African countries that resulted in the creation of the Organization of African Unity, are still relevant.³³ The words of the first Ghanaian president (1957 – 1966) implied African political unification with a single united African political entity. In his opinion, Africa should integrate first politically, then economically. This idea was supported by the radical, small socialist-oriented Casablanca Group. The majority of the newly independent African states gathered in the moderate Monrovia Group that did not support a political federation and preferred a gradualist economic and political approach: first economic integration at the sub-regional level with functional cooperation leading towards a common market, then a political integration with a single Pan-African political union.³⁴ To solve this conflict, the OAU was formed as a compromise by these two groupings³⁵ “to promote the unity and solidarity of the

³² Olivier, G. 2010. Regionalism in Africa: Cooperation without Integration? *Strategic Review for Southern Africa*. 32(2):1.

³³ Kah, H. K. 2012. “Africa must Unite”: Vindicating Kwame Nkrumah and Uniting Africa Against Global Destruction. *The Journal of Pan African Studies*. 4(10):30.

³⁴ Biswaro, J. M. 2004. *Deepening Africa's Integration: From OAU to AU*. Dar es Salaam, Tanzania: Tanzania Publishing House Limited. p. xvii; Gerrit, O. 2010. Regionalism in Africa: Cooperation without Integration? *Strategic Review for Southern Africa*. 32(2):27.

³⁵ Biswaro, J. M. 2004. *Deepening Africa's Integration: From OAU to AU*. Dar es Salaam, Tanzania:

African states [and] to coordinate and intensify their cooperation and efforts to achieve a better life for the people of Africa³⁶. The establishment of the OAU is the culmination of a long process that started already in the 20th century with the Pan-Africanist movements³⁷ and it represents a victory for Pan-Africanism.³⁸ Pan-Africanism stands for the “spirit of solidarity and cooperation among African leaders and societies”³⁹ and was first institutionalised in the Pan-African Congress at the end of the 19th century⁴⁰. The creation of the OAU was the second institutionalisation of the Pan-African movement.

Half a century after the publication of the book by Dr. Nkrumah with the same title “Africa must unite”, there is no “United States of Africa”, like some Pan-Africanist leaders⁴¹ wanted it to be formed. In 2002, the CAAU entered into force and the continental union OAU was succeeded by an upgraded continental institution, the AU.⁴² According to Murithi, the spirit of Pan-Africanism was once again revived and utilized to launch the creation of the African Union – the third attempt on institutionalising Pan-African principles.⁴³

The transformation of the OAU into the AU became necessary for several reasons: first, the OAU's main objectives, namely eradicating colonial subjugation and racism, ending apartheid, and establishing the independence of African states, were achieved.⁴⁴ Secondly, the OAU's main principals of non-interference of member states

Tanzania Publishing House Limited. At xxv.

³⁶ Articles 2 (1) (a) and (b) of the OAU Charter. 1963. Addis Ababa, Ethiopia: OAU. Available: http://www.au.int/en/sites/default/files/OAU_Charter_1963_0.pdf. [2013, July 2].

³⁷ Picasso, T. J. L. 2003. *From the Organisation of African Unity (OAU) to African Union (AU): Trajectory, Lessons and Challenges*. Maputo, Mozambique: Central Imprensa e Editora de Maputo. Ministry of Foreign Affairs and Cooperation. At 108.

³⁸ Biswaro, J. M. 2004. *Deepening Africa's Integration: From OAU to AU*. Dar es Salaam, Tanzania: Tanzania Publishing House Limited. At viii.

³⁹ Murithi, T. 2005. *The African Union: Pan-Africanism, Peacebuilding and Development*. Aldershot, England: Ashgate. At 2.

⁴⁰ Murithi, T. 2005. *The African Union: Pan-Africanism, Peacebuilding and Development*. Aldershot, England: Ashgate. At 8.

⁴¹ e. g. Kwame Nkrumah from Ghana, Sekou Toure from Guinea, Leopold Senghor from Senegal, Banar Abdel Nasser from Egypt and Ali Ben Bella from Algeria. See Murithi, T. 2005. *The African Union: Pan-Africanism, Peacebuilding and Development*. Aldershot, England: Ashgate. At 2.

⁴² Kam Kah, H. 2012. „Africa Must Unite“: Vindicating Kwame Nkrumah and Uniting Africa Against Global Destruction. *The Journal of Pan African Studies*. 4(10):26.

⁴³ Murithi, T. 2005. *The African Union: Pan-Africanism, Peacebuilding and Development*. Aldershot, England: Ashgate. At 3.

⁴⁴ Biswaro, J. M. 2004. *Deepening Africa's Integration: From OAU to AU*. Dar es Salaam, Tanzania: Tanzania Publishing House Limited. At 46; Fagbayibo, B. 2011. Rethinking the African Integration Process: A Critical Politico-Legal Perspective on Building a Democratic African Union. *SAYIL*. 36:213; Packer, C. A. A. & Rukare, D. 2002. The New African Union and its Constitutive Act. *The*

in the domestic affairs of neighbouring countries and the respect of the colonial inherited national frontiers were extremely damaging to the ideal of regional integration.⁴⁵ Thirdly, the OAU was perceived as a club of African Heads of States, most of whom were not legitimately in power⁴⁶ and notorious in their violation of human rights and corruption;⁴⁷ therefore, it was sometimes dubbed the “dictators club”⁴⁸. Finally, the irreversible globalisation increased Africa's marginalisation in the world and called for deeper economic integration. In this vein, the economic component of Africa's integration was given much weight in the adoption of the Abuja Treaty in 1991. All this forced Africa to create a new institution, because the OAU's capacity and maneuvering space was increasingly reduced.⁴⁹ The OAU was in essence a political, anti-apartheid and anti-colonial organisation and made important and notable contributions in these fields.⁵⁰ However, confronted with the problems Africa was having after the struggle for liberation, the OAU revealed itself impotent at the dawn of the 21st century. Thus, the AU was launched to substitute the largely dysfunctional OAU. The transmutation of the OAU into the AU through the Constitutive Act of the AU symbolises the necessary plan to help solving continental problems and also the imperative of fast-tracking the process of integration towards the African overall goal consisting in the formation of the African Economic Community.⁵¹ The AU is equipped with stronger administrative mechanisms and greater power of intervention in the affairs of its member states than its predecessor.⁵² Although the AU's mandate and capacity in comparison to the OAU has

American Journal of International Law. 96:366.

⁴⁵ Gerrit, O. 2010. Regionalism in Africa: Cooperation without Integration? *Strategic Review for Southern Africa*. 32(2):27 and 28.

⁴⁶ Murithi, T. 2005. *The African Union: Pan-Africanism, Peacebuilding and Development*. Aldershot, England: Ashgate. At 26 and 27.

⁴⁷ Biswaro, J. M. 2004. *Deepening Africa's Integration: From OAU to AU*. Dar es Salaam, Tanzania: Tanzania Publishing House Limited. At 61.

⁴⁸ Reynolds, P. 2002, July 8. African Union Replaces Dictators' Club. *BBC News World Edition*. Available: <http://news.bbc.co.uk/2/hi/africa/2115736.stm>. [2013, June 30].

⁴⁹ Picasso, T. J. L. 2003. *From the Organisation of African Unity (OAU) to African Union (AU): Trajectory, Lessons and Challenges*. Maputo, Mozambique: Central Imprensa e Editora de Maputo. Ministry of Foreign Affairs and Cooperation. At 108.

⁵⁰ Biswaro, J. M. 2004. *Deepening Africa's Integration: From OAU to AU*. Dar es Salaam, Tanzania: Tanzania Publishing House Limited. At 120.

⁵¹ Fagbayibo, B. 2011. Rethinking the African Integration Process: A Critical Politico-Legal Perspective on Building a Democratic African Union. *SAYIL*. 36:213.

⁵² Adebajo, A. & Paterson, M. (eds). 2012. *The African Union at Ten: Problems, Progress, and Prospects*. Centre for Conflict Resolution Cape Town, South Africa. Friedrich-Ebert-Stiftung Berlin, Germany. International Colloquium Report. 30 – 31 August 2012, Berlin, Germany. At 1. Available: http://www.ccr.org.za/images/pdfs/vol41_au_at_ten_6may2013.pdf. [2013, November 27].

improved, it is basically another relatively weak intergovernmental institution whose role, however, consists in the important task of coordinating and monitoring Africa's integration process.⁵³ In fact, the AU might end as a transitional institution towards the Pan-African union government that Dr. Nkrumah and his followers in the Casablanca group dreamt of already in the early 1960s.⁵⁴

In 2013, the AU celebrated its Golden Jubilee under the theme “Pan-Africanism and African Renaissance”. It is expected that the newly elected chairperson of the AU Commission (AUC), Dr. Nkosanzana Dlamini-Zuma, will lead the AU into a “second transition”.⁵⁵ In her opening remarks to the 20th Ordinary Session of the Assembly of Heads of State and Government of the AU on the 27th of January 2013 in Addis Ababa, the new chairperson highlighted that

“(...) the spirit of Pan-Africanism and the ideals of the African Renaissance (...) must propel us towards an integrated, people-centred prosperous Africa at peace with itself. It is this spirit and ideals that inspired the adoption of the Lagos Plan of Action in 1980, the Abuja Treaty in 1990 and the NEPAD in 2001.”⁵⁶

As can be inferred from the above quotation, Dlamini-Zuma uses the emotional concept of Pan-Africanism to call for the continuation of ambitious regional and continental integration beyond the treaties that have already been adopted in exactly this

⁵³ Zondi, S. 2013. *The African Union Summits in 2013: Towards a Second Transition (Part 1)*. SAFPI Policy Brief No 27. February. Cape Town, South Africa: SAFPI. At 1. Available: http://www.safpi.org/sites/default/files/publications/SAFPI_Policy_Brief_27.pdf. [2013, November 27].

⁵⁴ The AU's own Audit Report from 2007 „Towards a People-centered Political and Socio-economic Integration and Transformation of Africa“ suggests to speed up and deepen the socio-economic and political transformation towards African Unity and eventual Union Government. However, although some people think that the report is a historic document with objective audit of the AU and serious recommendations, the AU did not want to present the report in more details and wanted even less to adopt some of the 159 recommendations. The member of the Audit Panel, like Abdalla Bujra from Kenya were all very disappointed by the attitude of the AU. Bujra, A. The AU Audit Report: A Brief Note. 2008, February 14. *Pambazuka News*. Available: <http://www.pambazuka.org/en/category/comment/46093>. [2013, June 30].

⁵⁵ Zondi, S. 2013. *The African Union Summits in 2013: Towards a Second Transition (Part 1)*. SAFPI Policy Brief No 27. February. Cape Town, South Africa: SAFPI. At 1. Available: http://www.safpi.org/sites/default/files/publications/SAFPI_Policy_Brief_27.pdf. [2013, November 27].

⁵⁶ Dlamini-Zuma, N. 2013. Welcome Remarks. Opening Session of the 20th Ordinary Session of the Assembly of Heads of State and Government of the AU. January 27. Addis Ababa, Ethiopia: AU. Available: <http://cpauc.au.int/en/content/welcome-remarks-he-dr-nkosazana-dlamini-zuma-chairperson-african-union-commission-opening-se>. [2013, July 2].

enthusiasm for Africa's fight against international discrimination and marginalisation and for social, economic and political development.

This emotional concept of Pan-Africanism already facilitated extremely ambitious treaties and programmes like the ones mentioned by Dr. Dlamini-Zuma.⁵⁷ The theme chosen for the Golden Jubilee of the AU has the potential to lead into a second period that is marked by the shift from cooperation through an intergovernmental system under the AU towards a strong supranational state. Throughout her speeches, Miss Dlamini-Zuma calls for more “bold steps”. The future will show, if African leaders are ready for the bold steps that the new AUC proposes, i. e. to share sovereignty and advance common interests with a strong continental organisation.

2.3 The Normative Framework for Africa's Regional Integration

The new AU took all the powers of its predecessor, and all the treaties and protocols governing the OAU apply to it as well.⁵⁸ Thus, the normative framework concerning the AU consists of various treaties, protocols and declarations. Its main legal documents that account for the current legal framework of the AU are the Abuja Treaty from 1991, the CAAU from 2000, the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament from 2001, the Protocol of the Court of Justice of the AU from 2003, the Protocol on Relations between the AU and RECs from 2007, and the Protocol of the Statute of the African Court of Justice and Human Rights from 2008.

The CAAU is the latest treaty and, according to the former South African president Mbeki, the supreme law of the continent.⁵⁹ A variety of expectations from this new legal document have fallen short. People were expecting clarifying explanations on

⁵⁷ According to Zondi, the decisions to establish the OAU and to adopt the Lagos Plan of Action in 1980 and the Abuja Treaty in 1991 in order to accelerate the creation of the African continental economic community can best be understood as “irrational, romantic and even foolish (...) because they were inspired by lofty ideas, rather than what was in the realm of contemporary probabilities”. Zondi, S. 2013. The African Union Summits in 2013: Pan-Africanism and African Renaissance? (Part 3). SAFPI Policy Brief No 31. March. Cape Town, South Africa: SAFPI. At 1. Available: http://www.safpi.org/sites/default/files/publications/SAFPI_Policy_Brief_31.pdf. [2013, November 27].

⁵⁸ Preamble and Article 33 (1) and (2) of the CAAU.

⁵⁹ Saurombe, A. 2012. An Analysis of Economic Integration in Africa with specific reference to the African Union and the African Economic Community. *SAPL*. 27: 296.

different controversial details in the African normative regional integration framework. The Act consists of 33 articles that “are not very clear”, “leaving behind many issues that must be fleshed out”⁶⁰. As the next section will show, the provisions on the legal status of Africa's key integration players and their relations are indeed quite scarce.

2.3.1 Treaties, Protocols, Declarations and Programmes Governing the Process of Regional Integration in Africa over the last 50 Years

Since the creation of the OAU by the OAU Charter in 1963, a number of different legal instruments have been adopted to govern the process of regional integration in Africa. On the 25th of May 1963, the OAU Charter that established the OAU was signed by 32 African states. According to Article 2 of the Charter, the OAU was set up as a multi-purpose organisation. In addition to promoting the unity and solidarity of African states, it aimed at cooperation in the political, diplomatic, economic, educational, cultural, health, scientific and technical, defense and security sectors. Some argue that the OAU Charter was less successful due to the inclusion of the respect for the colonially inherited national frontiers and the principle of non-interference in the member states' domestic affairs;⁶¹ others argue that the OAU as an institution was successful because it complemented adequately the African efforts to attain the decolonisation of the continent and the eradication of apartheid⁶². Although the OAU was partially successful in the political sector, it failed to resolve the problems of Africa's economic integration.

African leaders found it necessary to transform the focus of the OAU from political liberation to economic development.⁶³ Hence, the Lagos Plan of Action for the Economic Development of Africa and the Full Act of Lagos were adopted in 1980 to deal with the economic problems in a unified, Pan-Africanist fashion. These

⁶⁰ Udombana, N. J. 2002. The Institutional Structure of the African Union: A Legal Analysis. *California Western International Law Journal*. 33(69):73.

⁶¹ Gerrit, O. 2010. Regionalism in Africa: Cooperation without Integration? *Strategic Review for Southern Africa*. 32(2):27 and 28.

⁶² Dlamini-Zuma, N. 2013. Welcome Remarks. Opening Session of the 20th Ordinary Session of the Assembly of Heads of State and Government of the AU. January 27. Addis Ababa, Ethiopia: AU. Available: <http://cpauc.au.int/en/content/welcome-remarks-he-dr-nkosazana-dlamini-zuma-chairperson-african-union-commission-opening-se>. [2013, July 2].

⁶³ African Union. *NEPAD. Historical Context: Origins and Influences*. Available: <http://www.nepad.org/history>. [2013, July 2].

programmes were a step forward, leading towards better economic integration.⁶⁴ The Final Act of Lagos also states that the measures included in the Lagos Plan of Action are “a first step towards the creation of an African Economic Community”⁶⁵. According to the Final Act of Lagos, the AEC should have been set up by the year 2000 to ensure the economic, social and cultural integration of the African continent. Soon, it became clear that this timeframe for the creation of the AEC was more than ambitious and impossible to reach.

In 1991, the Treaty establishing the African Economic Community, named after its place of birth – Abuja Treaty – was adopted to reorganise the timeframe of Africa's regional economic integration. In Article 6, the Abuja Treaty presents a table with six stages of variable duration over a period of 34 years to establish the AEC.⁶⁶ The new timeframe of 34 years, inspired by the linear European integration process from 1957 to 1991, was revealed to be overly ambitious as well.

In 2002, the CAAU, came into force. It established the AU that substituted the OAU.

2.3.2 The Legal Status of Africa's Key Integration Players

In order to understand Africa's playground of regional integration with its numerous integration players, it is crucial to analyse their legal status before examining the relationship – the relational framework – between them, in the next section.

Eight Regional Economic Communities are entrusted with realising the AEC under the umbrella of the AU.⁶⁷ That makes a number of institutions responsible for the

⁶⁴ Gerrit, O. 2010. Regionalism in Africa: Cooperation without Integration? *Strategic Review for Southern Africa*. 32(2):29.

⁶⁵ Lagos Plan of Action. 1980. Lagos, Nigeria: OAU. Available: http://www.nepadst.org/doclibrary/pdfs/lagos_plan.pdf. [2013, July 2].

⁶⁶ According to Article 6 (2) of the Abuja Treaty the stages and timeframes are:

- a. Strengthening of existing RECs and establishing RECs in regions where they do not exist (by 1999)
- b. Strengthening of integration at the regional and continental levels as well as coordination and harmonisation of activities among the existing and future RECs (by 2007)
- c. Establishment of a Free Trade Area and Customs Union at the level of each REC (by 2017)
- d. Establishment of a Customs Union at the continental level (by 2019)
- e. Establishment of an African Common Market (by 2023)
- f. Establishment of a single domestic market and a Pan-African Economic and Monetary Union with a single African Central Bank and a single African Currency as well as a Pan-African Parliament (by 2028).

⁶⁷ See African Union. Decisions and Declarations – Decision on the Moratorium on the Recognition of

process of regional economic integration in Africa. According to Oppong, the legal status of the RECs within the AEC, and the AEC within the AU is “[p]erhaps one of the greatest mysteries about Africa's economic integration”⁶⁸. However, the concept of legal personality for international institutions is crucial, because it allows an institution to stand by itself, to assume obligations and dispose of rights that are distinct of its members.

2.3.2.1 The Legal Status of the AU

From a symbolic perspective, the AU plays an important role, as it represents the institutionalisation of the much cherished goal of Pan-African unity.⁶⁹ It is constituted as an intergovernmental organisation, comprising of Africa's elite heads of government, cabinet ministers, diplomats, and civil servants. However, it is said to be on its way to “evolve from a union of presidents to a union of people”⁷⁰. Today, the AU comprises all African sovereign states, except Morocco. Thus, the AU represents 54 African member states⁷¹ and about one billion people. It is regarded as the umbrella organisation standing up for a “united and strong Africa”⁷², monitoring the whole process of social, cultural, political and economic integration in Africa.

From a legal perspective, the AU is not explicitly given legal personality by the CAAU. However, its international legal personality can be inferred from Article 4 (h) and (j) of the CAAU that states the principle of non-indifference⁷³ and Article 30 of the

Regional Economic Communities (RECs) DOC.EX.CL/278 (IX). AU Doc. Assembly/AU/Dec. 111 – 132 (VII). Assembly of the African Union. Seventh Ordinary Session. 1 – 2 July 2006. Banjul, The Gambia. Available:

http://www.au.int/en/sites/default/files/ASSEMBLY_FR_01_JULY_03_JULY_2006_AUC_SEVENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS.pdf. [2013, December 3]; Article 3 (l) CAAU; Articles 28 (1) and 88 AEC Treaty.

⁶⁸ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 69.

⁶⁹ Fagbayibo, B. 2011. Rethinking the African Integration Process: A Critical Politico-Legal Perspective on Building a Democratic African Union. *SAYIL*. 36:225.

⁷⁰ Gottschalk, K. 2012. The African Union and its Sub-Regional Structures. *Journal of African Union Studies*. 1(1):16.

⁷¹ African Union. List of Countries which have Signed, Ratified / Acceded to the Constitutive Act of the African Union. 16.07.2012. Available: <http://www.au.int/en/sites/default/files/Constitutive%20Act%20-%20Final.pdf>. [2013, December 3].

⁷² Slogan of the AU. Available: <http://au.int/en/>. [2013, July 2].

⁷³ While the OAU was known for its use of the principles of “non-interference” and “non-intervention” in the internal affairs of member states and preferred to turn a blind eye to illegal acts taking place inside African states, the CAAU moved the organisation from these principles to the principle of “non-indifference”. Makinda, S. M. & Okumu, F. W. 2008. *The African Union. Challenges of*

CAAU on the suspension of membership. Article 4 (h) of the CAAU confers to the AU “[t]he right [...] to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war, crimes, genocide and crimes against humanity”. Through an amendment from 2003, the AU is also entitled to intervene in the case of “serious threat to legitimate order to restore peace and stability to the Member State of the Union upon recommendation of the Peace and Security Council”⁷⁴. Article 4 (j) of the CAAU provides member states with “[t]he right [...] to request intervention from the Union in order to restore peace and security”. Clearly, the AU has the competence to intervene in the internal affairs of its member states in respect of “grave circumstances” and “serious threat to legitimate order”, or if requested by a member state. Article 30 of the CAAU allows the suspension of membership vis-à-vis states whose governments “come to power through unconstitutional means”.⁷⁵ In these situations, the AU is mandated to act as an own legal person with power over its members. Furthermore, the AU's international legal personality can be inferred from the General Convention on Privileges and Immunities of the Organization of African Unity. Article 1 of the Convention provided the OAU, the AU's predecessor, with “juridical personality”⁷⁶.

It is without controversy that the legal personality of an institution does not have to be laid down explicitly in its founding treaty. The European Union for example has gained a specific provision on its international legal personality only under the Lisbon Treaty signed in 2007; nevertheless, its personality was never contested before this explicit article of the Lisbon Treaty.

Globalisation, Security, and Governance. New York, USA: Routledge. At 30; Adebajo, A. & Paterson, M. (eds). 2012. *The AU at Ten: Problems, Progress, and Prospects*. International Colloquium Report. 30 – 31 August. Berlin, Germany. At 14. Cape Town, South Africa: Centre for Conflict Resolution. Available: http://www.ccr.org.za/images/pdfs/vol41_au_at_ten_6may2013.pdf. [2013, December 20].

⁷⁴ Article 4 of the Protocol on Amendments to the Constitutive Act of the African Union.

⁷⁵ In accordance with this provision, the AU regularly suspends memberships; e. g. Madagascar in 2002 and 2009, Mauritania and Togo in 2005, Guinea in 2008, Ivory Coast in 2010. See: Fagbayibo, B. 2011. Rethinking the African Integration Process: A Critical Politico-Legal Perspective on Building a Democratic African Union. *SAYIL*. 36:214.

⁷⁶ General Convention on Privileges and Immunities of the Organisation of African Unity. 25 October 1965. Available: <http://au.int/en/content/general-convention-privileges-and-immunities-organization-african-unity>. [2013, July 2].

2.3.2.2 The Legal Status of the AEC within the AU

In quest of achieving economic growth and development, the OAU adopted the Treaty Establishing the African Economic Community. Article 4 (1) of the Treaty provides the following objectives for the community:

- “(a) To promote *economic*, social and cultural *development* and the integration of African economies [...];
- (b) To establish, on a continental scale, a framework for development, mobilisation and utilisation of the human and material resources of Africa in order to achieve a *self-reliant development*;
- (c) To promote co-operation in all fields of human endeavour in order to [...] contribute to [...] *economic integration* [...];
- (d) To coordinate and harmonise policies among existing and future economic communities in order to foster the gradual establishment of the Community.”⁷⁷

This article highlights the importance that the founding fathers of the AEC Treaty put on the *economic* development and integration of Africa. The AEC Treaty is the foundation for the establishment of the AEC, an economic community that is supposed to cover the whole of Africa. At present, there are only five states – Djibouti, Eritrea, Madagascar, Somalia and South Sudan – that have all signed, but not yet ratified the AEC Treaty.⁷⁸ If successful, it will be the largest economic integration organisation (in terms of membership) in the world.⁷⁹ Thus, economic integration is envisaged by the AU through the Abuja Treaty.⁸⁰ As mentioned above, the AU is an umbrella organisation that aims at the “acceleration of the political and socio-economic integration of the continent; coordination and harmonisation of policies between the existing and future RECs for the gradual attainment of the objectives of the Union”⁸¹.

⁷⁷ Article 4 (1) of the Abuja Treaty. [emphasis added].

⁷⁸ African Union. List of Countries which have Signed, Ratified / Acceded to the Treaty Establishing the African Economic Community. 28.03.2013. Available: <http://www.au.int/en/sites/default/files/Treaty%20Establishing%20the%20AEC.pdf>. [2013, December 3].

⁷⁹ Oppong, F. 2010. The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web. *African Journal of International and Comparative Law*. 18(1):92.

⁸⁰ Forere, M. 2012. Is Discussion of the “United States of Africa” Premature? Analysis of ECOWAS and SADC Integration Efforts. *Journal of African Law*. 56(1):36.

⁸¹ See Article 3 of the CAAU.

Asante observes that the AEC has no “letterhead of its own”, it “has, in fact become just a division, albeit an important one, at a continental *political* institution”.⁸² Oppong sees the AEC within the AU as “the economic leg of the AU”.⁸³ He explains that if the AU is envisioned as “a political and umbrella organisation championing the cause of African unity – social, cultural, political and economic – then the AEC is that part of the AU solely devoted to the issue of economic integration”.⁸⁴

Article 98 (1) of the AEC Treaty, entitled “Legal Status”, declares that the Community shall form “an integral part” of the OAU. Article 99 of the Treaty continues in the same line and declares that the AEC Treaty and the protocols shall form “an integral part” of the OAU Charter. From these two provisions, it could be deduced that the AEC does not dispose of its own legal personality next to the AU. Put simply, if the AEC forms “an integral part”, i. e. is included in the AU, the AEC does not have a distinct or separate identity. However, Article 98 (2) of the Abuja Treaty allows for the interpretation that the AEC does dispose of its own legal personality. This article provides that the Secretary-General “[i]n his capacity as the legal representative of the Community” and “on behalf of the community” may “[e]nter into contracts and [b]e a party to judicial and other legal proceedings”. Thus, if the Secretary-General is entitled to engage the AEC through contracts and represent the AEC's interests in judicial and legal proceedings, it means that the AEC has legal personality.

Asante and Oppong regret the loss of identity of the AEC.⁸⁵ The confusion about the AEC's clear distinct identity entails indeed a variety of legal problems. The most obvious problem is that the AU tends to take over the AEC's interests and adopts policies dealing with AEC-related issues.⁸⁶

⁸² Asante, S. K. B. 2001. *Towards an African Economic Community*. Africa Institute Research Paper No. 64. Pretoria, South Africa: Africa Institute of South Africa. At 8 and 9. [emphasis added].

⁸³ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 70.

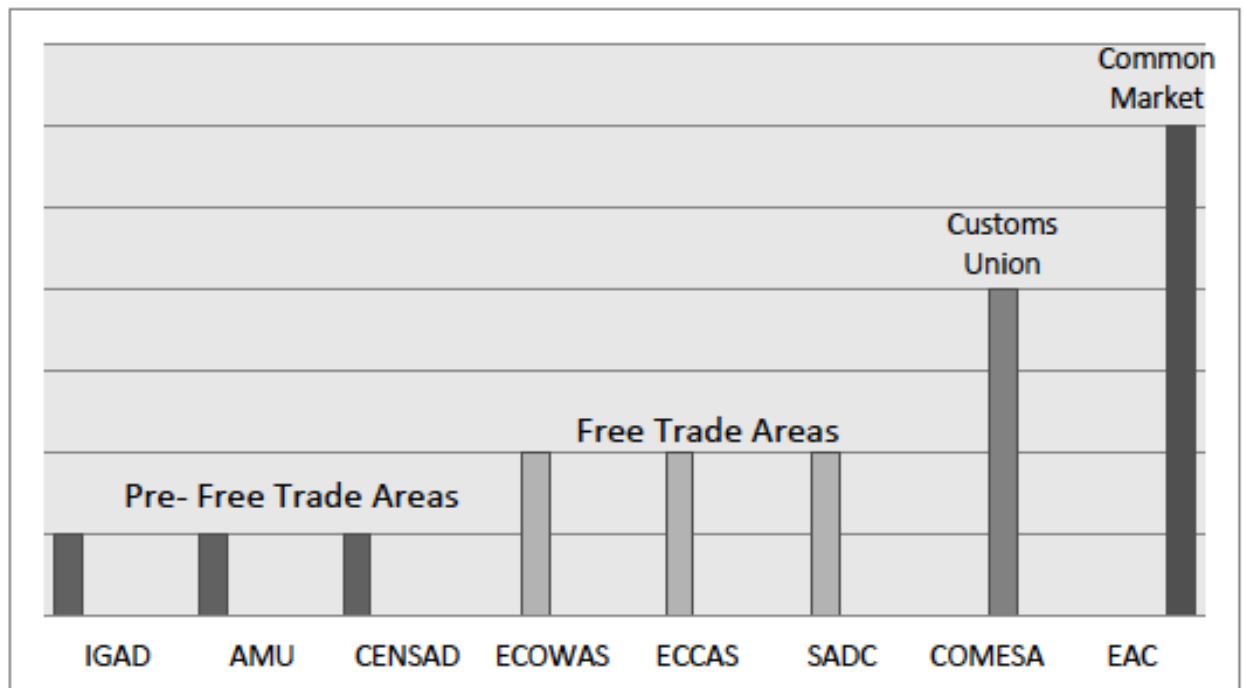
⁸⁴ Oppong, R. F. 2009. “Redefining the Relations between the African Union and the Regional Economic Communities in Africa” in: Bösl, A. & Erasmus, G. & Hartzenberg, T. & McCarthy, C. (eds). *Monitoring Regional Integration in Southern Africa Yearbook*. Stellenbosch, South Africa: TRALAC & Windhoek, Namibia: Konrad-Adenauer-Stiftung. At 11. Available: http://www.kas.de/wf/doc/kas_20303-1522-1-30.pdf?110125181230. [2013, December 30].

⁸⁵ Asante, S. K. B. 2001. *Towards an African Economic Community*. Africa Institute Research Paper No. 64. Pretoria, South Africa: Africa Institute of South Africa. At 8 and 9; Oppong, R. F. 2010. The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web. *African Journal of International and Comparative Law*. 18(1):99.

⁸⁶ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge

2.3.2.3 The Legal Status of RECs within the AU / AEC

Since its decision in 2006⁸⁷, the AU recognises only eight out of some 14 operating RECs on the African continent. These RECs consist primarily of trade blocs and, in some cases, also involve political cooperation. The following graph⁸⁸ shows the status of integration of Africa's eight RECs in 2013.



Article 88 (1) of the AEC Treaty states that “[t]he Community shall be established mainly through the co-ordination, harmonisation and progressive integration of the activities of regional economic communities”. Article 3 (l) of the CAAU lists as an objective of the AU the coordination and harmonisation of policies between existing and future RECs for the gradual attainment of the Union, which includes the establishment of the AEC. Article 88 of the Abuja Treaty as well as Article 3 (l) of the

University Press. At 71.

⁸⁷ African Union. Decisions and Declarations – Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs) DOC.EX.CL/278 (IX). AU Doc. Assembly/AU/Dec. 111 – 132 (VII). Assembly of the African Union. Seventh Ordinary Session. 1 – 2 July 2006. Banjul, The Gambia. Available: http://www.au.int/en/sites/default/files/ASSEMBLY_FR_01_JULY_03_JULY_2006_AUC_SEVENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS.pdf. [2013, December 3].

⁸⁸ African Union Commission. 2013. *Status of Integration in Africa (SIA IV)*. At 19. Available: [http://www.au.int/en/sites/default/files/SIA%202013\(latest\)_En.pdf](http://www.au.int/en/sites/default/files/SIA%202013(latest)_En.pdf). [2013, December 3].

CAAU envision RECs as the “building blocs”, “pillars” or “implementing arms” of the AU / AEC's goal of an economically integrated African continent. Put in other words, the various sub-regional common market zones are meant to combine and form the future Africa-wide economic union.⁸⁹ In this process, RECs are given different unofficial names that should demonstrate the concept of RECs as assistants in the implementation process of the Abuja Treaty towards the full realisation of the AEC. However, these terms do not have any legal meaning. Neither the AEC Treaty nor the CAAU contains a specific provision on the status of the RECs within the AU / AEC.

Oppong's question reflects the confusion in this regard: “Are they (RECs) mere institutional observers within the AEC? Are they its organs, members, agents or subjects?”⁹⁰ After a detailed analysis, Oppong concludes that RECs are “subjects [of the AEC] with a mandate to work towards the realisation of the African Economic Community”⁹¹. Being a subject implies a vertical relationship with binding decisions from the top down to the bottom. Accordingly, RECs as subjects of the AEC would be bound by decisions from the AEC. However, the same Oppong writes in another article that although the RECs are the building blocs for the AEC, the RECs that do have their own legal personality are not members of the AEC or party to the Abuja Treaty, as only individual member states within the RECs are parties to the treaty.⁹² As a result, it is safe to say that the RECs are not legally bound by the policies and laws of the AEC. Therefore, it might not be appropriate to say that the RECs are “subjects” of the AEC, because the AEC legally does not have the power to enforce decisions over the RECs. Oppong means that RECs are subjects because they are mandated to establish the AEC. However, RECs are not bound by the Abuja Treaty because they did not sign and ratify

⁸⁹ Saurombe, A. 2012. An Analysis of Economic Integration in Africa with Specific Reference to the African Union and the African Economic Community. *SAPL*. 27:297; Africa's Regional Economic Communities Briefing to the UN Member States. 2010. UN Office of the Special Advisers on Africa & AU Permanent Observer Mission to the UN. Available: <http://www.un.org/africa/osaa/reports/new-reports/Background%20Note%20to%20the%20RECS%20briefings%20to%20Member%20States.pdf>. [2013, December 3].

⁹⁰ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 71.

⁹¹ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 72.

⁹² Oppong, F. 2010. The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web. *African Journal of International and Comparative Law*. 18(1):94.

it. Only the member states are signatories to the treaty.⁹³ To make the RECs subjects of the AEC, they have to sign the Abuja Treaty and subordinate themselves under the law of the AEC. Article 2 of the Abuja Treaty implicitly states that the sovereign African states are the members – “high contracting parties” – to the AEC, but there is no provision in the AEC Treaty that would limit the membership to states only. RECs can perfectly become members as well.

2.3.3 Africa's Existing “Relational Framework”⁹⁴

Due to the number of integration actors in Africa, several legal documents have to be consulted in order to decrypt how these actors relate one to another. The Abuja Treaty and the CAAU as well as the different founding treaties of the RECs and a special Protocol signed by the OAU / AU and the RECs contain all provisions that shed some light on the complex web of legal relations. However, the analysis in this section will show that Africa's existing relational framework does not allow to effectively and coherently govern the relationships between the different institutions that are mandated with the continent's integration. Thus, reforms for a more effective and coherent structure of Africa's integration players and their relations are highly recommendable. Chapter 4 on African solutions for the current African integration problem consisting in the “spaghetti bowl” of legal relations will provide for some ideas in this regard.

2.3.3.1. Community AU / AEC and Sub-Communities Relations

As mentioned above, every REC disposes expressly of its own legal personality according to its founding treaty.⁹⁵ Thus, RECs have separate legal systems from the legal system of the AU / AEC. The Abuja Treaty from 1991 was already aware of the importance of regulating the relations between the Community and the sub-communities. Therefore, Article 88 of the Treaty is dedicated to the relations between the AEC and RECs. Article 88 (1) of the Treaty reiterates the basic process of regional

⁹³ Saurombe, A. 2012. An Analysis of Economic Integration in Africa with Specific Reference to the African Union and the African Economic Community. *SAPL*. 27:301; Oppong, F. 2010. The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web. *African Journal of International and Comparative Law*. 18(1):97.

⁹⁴ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 2.

⁹⁵ See for example, Article 186 (1) of the COMESA Treaty or Article 138 (1) of the EAC Treaty or Article 88 (1) of the ECOWAS Treaty.

integration in Africa consisting in that the AEC will be established through the support of the RECs. Article 88 (2) of the Treaty states that the establishment of the AEC is the final objective towards which the activities of the RECs shall be geared. In this undertaking, the member states shall promote the co-ordination and harmonisation of the integration activities of the Community. “[T]he Community shall be entrusted with the co-ordination, harmonisation and evaluation of the activities of [...] regional economic communities” according to Article 88 (3) of the Treaty. Article 88 (4) of the Treaty makes a comment on “rationalising the integration process at the level of each region”. The Abuja Treaty uses the sound-words “co-ordination” and “harmonisation” as well as “integration” and “rationalisation” without explaining how these concepts should be operationalised. Article 3 of the CAAU, that lists the objectives of the AU, takes the same vague vocabulary. Moreover, except for Article 3 (1), the CAAU does not contain any specific provision on relations at all. Article 33 (2) of the CAAU only clarifies that the CAAU “shall take precedence over and supersede any inconsistent or contrary provisions” of the Abuja Treaty from 1991.

Since the AEC / AU and the RECs have separate legal systems, the Treaty as well as the CAAU should have addressed their horizontal and vertical relationships, including issues such as hierarchy and supremacy, competences and subsidiarity, conflicts of laws and jurisdiction. Once the importance of effectively governing the legal relations between the RECs and the AU / AEC has been realised, the Secretary-General of the AEC and the corresponding Secretary-Generals of some RECs have adopted the Protocol on Relations between the AEC and the RECs in 1998⁹⁶, followed by the adoption of the Protocol on Relations between the AU and the RECs in 2007⁹⁷. When the latter enters into force, it will replace the former Protocol of 1998.⁹⁸ Strangely

⁹⁶ African Union. 1998. Protocol on Relations between the AEC and the RECs. Addis Ababa, Ethiopia: AU. Available: http://www4.worldbank.org/aft/ssatp/Resources/HTML/legal_review/Annexes/Annexes%20III/Annex%20III-04.pdf. [2013, December 3].

⁹⁷ African Union. 2007. Protocol on Relations between the AU and the RECs. Addis Ababa, Ethiopia: AU. Available: <http://www.afrimap.org/english/images/treaty/AU-RECs-Protocol.pdf>. [2013, December 3].

⁹⁸ Oppong, R. F. 2010. The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web. *African Journal of International and Comparative Law*. 18(1):92; Oppong, R. F. 2009. “Redefining the Relations between the African Union and the Regional Economic Communities in Africa” in: Bösl, A. & Erasmus, G. & Hartzenberg, T. & McCarthy, C. (eds). *Monitoring Regional Integration in Southern Africa Yearbook*.

enough, none of these two important documents can be found on the AU's homepage that lists chronologically all OAU / AU treaties, conventions, protocols and charters.⁹⁹ While the 1998 Protocol was signed by the AEC and some RECs (COMESA, SADC, IGAD and ECOWAS), the 2007 Protocol was signed only by six RECs (ECCAS, SADC, IGAD, CEN-SAD, UMA and EAC). Although the wording of the two protocols is different, the content remained basically the same. In the words of the Protocol of 1998, the parties' main objectives are “to promote the coordination and harmonization of the policies, measures, programmes and activities of regional economic communities to ensure [...] an efficient integration of the regional economic communities into the African Common Market”¹⁰⁰ and “to provide an institutional structure for the coordination of relations between the Community and the regional economic Communities” on the implementation of the AEC.¹⁰¹ In the words of the Protocol of 2007, the parties aim at formalizing “closer co-operation among the RECs and between them and the Union through co-ordination and harmonization of their policies, measures, programmes and activities in all fields and sectors”¹⁰² and establishing “a framework for co-ordination of the activities of the RECs” in their contribution to the realization of the AEC.¹⁰³ Chapter Two of the respective Protocols provides for the “coordination framework” (Protocol 1998) and the “institutional framework” (Protocol 2007). In this regard, two special coordination organs have been set up to ensure the implementation of the Protocol.

Another important provision for the relations between the AU / AEC and RECs can be found in Article 22 of the new Protocol and Article 21 of the former Protocol. Article 22 (1) of the Protocol of 2007 is entitled “Binding decisions on RECs” and commands that the AU shall take measures against a REC whose legal conduct is incompatible with the objectives of the Abuja Treaty, or whose implementation of its policies, measures, programmes and activities lags behind the time limits set out in

Stellenbosch, South Africa: TRALAC & Windhoek, Namibia: Konrad-Adenauer-Stiftung. At 7. Available: http://www.kas.de/wf/doc/kas_20303-1522-1-30.pdf?110125181230. [2013, December 30].

⁹⁹ See: African Union. OAU / AU Treaties, Conventions, Protocols & Charters. Available: <http://www.au.int/en/treaties>. [2013, December 3].

¹⁰⁰ Article 3 (b) of the Protocol of 1998.

¹⁰¹ Article 3 (d) of the Protocol of 1998.

¹⁰² Article 3 (a) of the Protocol of 2007.

¹⁰³ Article 3 (b) of the Protocol of 2007.

Article 6 of the AEC Treaty. Furthermore, the AU is enabled to address directives directly to member states of RECs that do not fulfill their obligations under the Abuja Treaty.¹⁰⁴ According to Article 22 (3) of the Protocol, the decisions by the AU may include any sanctions that seem appropriate in accordance with the CAAU. Article 21 of the former Protocol has the same content. This provision concerning the binding nature of the AU's decisions on the RECs is significant, because the RECs are precisely not members of the AEC Treaty and therefore normally not bound by the decisions emanating from the AU / AEC. Thus, the basis for binding obligations on those RECs that have signed the 2007 Protocol is laid down in Article 22. Although the new Protocol does not say anything about hierarchy and supremacy of the AU system over the RECs system, it results from Article 22 of the Protocol of 2007 that the two systems stand in a horizontal hierarchy and that the RECs have to adjust their systems to the standards of the AU. The RECs have to refrain from any actions that could jeopardise the attainment of the goals of the AU / AEC. This is at least the theory according to the legal provisions. In reality, it will be interesting to see how the AU can enforce its binding decisions on RECs that do not conform. It is all about finding effective sanctions that force the RECs to obey the AU's decisions.

The protocols elaborate on the relations between the AU / AEC and the RECs far beyond what is regulated in the Abuja Treaty and the CAAU. Since the protocols expressly give the AU / AEC system priority over the system of the RECs, it seems that not all RECs were willing to lose some power and sign it. The AEC Treaty as well as the CAAU does not state that the law of the AEC enjoys supremacy or priority over the laws of the African member states. The founding treaties of the RECs – with the exception of the EAC Treaty – do not contain such provisions either.¹⁰⁵ In this regard, the evolution of the legal system of the European Union should be quickly recalled. Although the EU admittedly is quite different from the typical international organisation like the AU, the European law is also international law¹⁰⁶ like the AU's regional international law. In the European Union, the founding treaties did not contain any

¹⁰⁴ Article 22 (2) of the Protocol of 2007.

¹⁰⁵ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 95.

¹⁰⁶ According to the ECJ decision *Van Gend en Loos*, the EU constitutes “a new legal order of international law”.

explicit provision on the hierarchy of EU law and national laws either. It was the European Court of Justice (ECJ) that in its two ground-breaking decisions of 1963 and 1964 established the principle of supremacy of EU law. In *Van Gend en Loos*, the ECJ held that the then “European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights”¹⁰⁷. Put simply, the European Economic Community (EEC) law represents a new legal order that is separate and distinct from the legal order of its member states. In *Costa v. E.N.E.L.*, the ECJ repeated that the member states of the EEC have limited their sovereign rights and created a body of law which binds both their nationals and themselves

“by creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community”¹⁰⁸.

Then, the Court elaborates further in the same vein that “the law stemming from the Treaty [EEC Treaty signed in Rome in 1957], an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions”. This evolution demonstrates that even in the absence of an express provision in the treaties, the Community's court of justice can infer the supremacy of the community law over national law by interpreting the text, structure and objectives of the treaties. In the case of the AEC, Article 5 (1) of the Treaty, that commands African member states to create favourable conditions for the development of the Community and to refrain from any actions that hinder the attainment of the AEC's objectives, could allow for such an interpretation. Moreover, the member states committed themselves to

¹⁰⁷ NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v. Netherlands Inland Revenue Administration. Case 26/62. Judgement of the Court of 1963, February 5. Available: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962CJ0026:EN:HTML>. [2013, December 3].

¹⁰⁸ Flaminio Costa v. E.N.E.L. Case 6/64. Judgement of the Court of 1964, July 15. Available: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964CJ0006:EN:HTML>. [2013, December 3].

observe the legal system of the Community¹⁰⁹ and to harmonise policies between the states, RECs and the Community¹¹⁰. Against this background, it is first and foremost up to the African Court of Justice (ACJ) to establish the principle of supremacy of AEC law over the national laws. Then, national courts will have to support and apply this principle. However, due to the problems and delays in setting up the ACJ, it remains to be seen if and when such a principle will be established in the AEC.

Concerning the hierarchical structure, the new Protocol of 2007 mentions in its preamble the principle of subsidiarity in the context of defining “the role of the Union and that of the RECs”. Unlike the European model, the Protocol, however, does not list any areas of competences that would be exclusive for the AU or those shared with the RECs. For the European Union, the competences of the Union and those of its 28 member states are clearly defined. Competences that are exclusive to the Union are listed in Article 3 of the Treaty on the Functioning of the EU (TFEU) and those that are shared with the member states are listed in Article 4 of the TFEU. The areas in which only the Union may legislate and adopt legally binding acts – exclusive competences – are limited to issues falling within the customs union, competition rules, monetary policy in the Euro zone, common fisheries policy and commercial policy. The use of the Union competences is governed by the principle of subsidiarity.¹¹¹ This implies that in areas, that do not fall within the exclusive competences of the Union, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but can rather, by the reason of the scale of the effect of the proposed action, be better achieved at Union level.¹¹² The EU's structure consists of different levels – supranational, national, regional and local – and the competences of all entities are clearly regulated in the treaties. The AU's structure is in some regards different, but also consists of several levels. The main difference is that the RECs are between the continental community and the member states, while in the EU, the Union is directly connected to its member states. Due to the enormous size of the African continent with

¹⁰⁹ Article 3 (e) of the AEC Treaty.

¹¹⁰ Articles 4 (1) (d) and 5 (1) of the AEC Treaty.

¹¹¹ Article 5 (1) of the TFEU.

¹¹² Article 5 (3) of the TFEU.

its current division of 55 sovereign countries, the grouping of countries into regional economic entities as cornerstones and building blocks of the AEC seemed to be a feasible and necessary step for Africa on its way towards full continental integration. That is why in the case of Africa there is one more legal system, that of the RECs, to take into account when drawing the complex web of relationships. However, the legal uncertainty that results from this complex web of relationships may also be a major impediment in Africa's process of regional integration.

2.3.3.2 Inter-Sub-Communities Relations

The Protocols on Relations of 1998 and 2007 are not only relevant for the relations between the AU / AEC and RECs, but also for the relations among the RECs. Article 3 (a) of the Protocol of 2007 states the formalisation, consolidation, and promotion of closer co-operation among the RECs through the co-ordination and harmonisation of their policies, measures, programmes and activities in all fields and sectors as an objective of the Protocol. Furthermore, it is also an objective of the Protocol to strengthen the RECs.¹¹³ Another objective with regards to the RECs that is noteworthy is the commitment to the acceleration of the integration process and shortening of the periods provided for in Article 6 of the AEC Treaty which are all behind their original schedules.¹¹⁴ Moreover, the Protocol lists as an objective the sharing of experiences in all fields among the RECs.¹¹⁵ Since the RECs have signed the Protocol, they took the obligation to all work together under the guidance of the AU towards a more coherent system – in terms of the Protocol, a coordinated and harmonised system – that will pave the way for the continent-wide African Economic Community.

The existing structure of the RECs today is still far from ideal. Already in 2006, UNECA published its study on regional integration in Africa¹¹⁶ that clearly concluded that the multiplicity of RECs in Africa as well as the African states' multiple memberships hinder the continental integration process. The RECs are by nature “non-

¹¹³ Article 3 (c) of the Protocol of 2007.

¹¹⁴ Article 3 (d) of the Protocol of 2007.

¹¹⁵ Article 3 (h) of the Protocol of 2007.

¹¹⁶ United Nations Economic Commission for Africa. 2006. *Assessing Regional Integration in Africa II, Rationalising Regional Economic Communities*. At XXIV and XXV, 115 – 128. Available: <http://www.uneca.org/aria2/>. [2013, December 3].

hierarchical regimes”¹¹⁷, because they were intended to take care of the economic issues of their member states in their regions. Thus they all have the same mission, just in different areas. Be it for economic, political or strategic reasons, African countries signed up for more than one REC and started to create the famous “spaghetti bowl” of overlapping memberships and jurisdictions between the sub-communities, as it is known today.

Since 2006 already, the need to rationalise the number of RECs and their relations among each other resounds throughout the continent. African states have already started to put in place a variety of programmes and projects to rationalise, i. e. pooling tasks together.¹¹⁸ The most ambitious initiative is the proposed COMESA-EAC-SADC Tripartite Free Trade Area (FTA) that will comprise 26 southern and eastern African states.¹¹⁹ This Tripartite FTA could result in the first “merger” between RECs, creating an example for other RECs to consider for themselves as well. The legal framework for those mergers will be discussed in more detail in Chapter 4 on the solutions for the current African integration problem.

Today, it is more urgent than ever to rationalise, because the more advanced the different sub-communities are on their path outlined in Article 6 of the Abuja Treaty, the more problematic the issue of multiple membership will become. Belonging to two different customs unions applying two different external tariffs is legally not possible.¹²⁰ At the stage of customs unions, states have to definitively make a choice in favour of one single community.

2.3.3.3 Sub-Communities and State Relations

To analyse how the national legal systems relate to the legal systems of the sub-communities, the founding treaties of the RECs should be consulted. It can be observed that the provisions referring to these relations are very diverse.

¹¹⁷ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 65.

¹¹⁸ Gathii, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. At 389.

¹¹⁹ OECD & WTO. 2011. *Negotiating the COMESA-EAC-SADC Tripartite FTA*. Available: <http://www.oecd.org/aidfortrade/47407301.pdf>. [2013, December 3].

¹²⁰ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 77 and 78.

The EAC Treaty¹²¹ that established the East African Community is very clear about the community's legal system and its relationship with the members' national legal systems. Of all African founding RECs treaties, only the EAC Treaty contains an express provision on the supremacy of the Community law over national laws.¹²² The EAC Treaty was adopted in 1999 by Kenya, Tanzania and Uganda; in 2007, Rwanda and Burundi acceded to the Treaty. At the beginning, the EAC evolved according to Balassa's model of integration in several linear stages. The FTA that was set up by the Treaty in 1999 became an operational customs union (CU) in 2005, and the next stage – the common market – has already been agreed in 2009.¹²³ The entrance into force of the Protocol and its several annexes and schedules on the establishment of the common market on the 1st of July 2010 made the EAC the most advanced REC on the African continent.¹²⁴ However, the implementation of the Protocol in the national legal systems has been ailing and the monetary union that was slated to be set up by 2012 was postponed.¹²⁵ Against this background, the creation of the political federation currently seems illusionary.¹²⁶ Nonetheless, the EAC Treaty states clearly the supremacy of sub-community law above the national law of the member states. Under Article 8 (4) of the Treaty, “Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty”. The EAC Treaty provides for a separate community legal system with a legislative organ – the Legislative Assembly, a policy organ – the Council of Ministers, and a judicial organ – the Court of Justice. Of paramount importance in the legal framework of the EAC is certainly the legislative organ that is empowered to enact community law, the so called

¹²¹ Available: <http://www.eac.int/treaty/>. [2013, December 3].

¹²² Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 95.

¹²³ EAC. 2011. *History of the EAC*. Available: http://www.eac.int/index.php?option=com_content&view=article&id=44&Itemid=54. [2013, December 3]; Gatthi, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. At 182.

¹²⁴ Gatthi, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. At 188.

¹²⁵ Reith, S. & Boltz, M. 2011. *Die East African Community: Regionale Integration in Ostafrika zwischen Anspruch und Wirklichkeit*. KAS Auslandsinformationen. 09/10/2011. At 97. Available: http://www.kas.de/wf/doc/kas_28725-544-1-30.pdf?110908155559. [2013, December 3].

¹²⁶ Reith, S. & Boltz, M. 2011. *Die East African Community: Regionale Integration in Ostafrika zwischen Anspruch und Wirklichkeit*. KAS Auslandsinformationen. 09/10/2011. At 98. Available: http://www.kas.de/wf/doc/kas_28725-544-1-30.pdf?110908155559. [2013, December 3].

bills¹²⁷, that supersede national laws according to Article 8 (4) of the EAC Treaty.

Since the EAC Treaty is the only treaty of the eight RECs that contains an express provision on the supremacy of Community law, it is advisable to examine the position of the REC's courts on that issue. Of the eight recognised RECs, the AMU and the IGAD do not have operational judiciaries¹²⁸, and the SADC Tribunal has been de facto suspended since 2010¹²⁹. Considering the different cases of the regional judiciaries, the boldness of some of their decisions, in relation to the fact that they are relatively new courts operating in a context in which adherence to notions of national sovereignty is very strong, is significant.¹³⁰ The ECOWAS Court of Justice's judgements contain *orbiter dicta* that might be interpreted as supporting supremacy of the Community law.¹³¹ In *Frank Ukor v. Alinnor*, the Court held that “[t]he revised Treaty from 1993 is the supreme law of ECOWAS, and it might be called its Constitution”¹³². In *Jerry Ugokwe v. The Federal Republic of Nigeria*, it held that “the distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law”, and furthermore, that “the kind of relationship existing between the Community Court and these national courts of Member States are not of a vertical nature between the Community and Member States, but demands an integrated Community legal order”¹³³.

The SADC Tribunal also showed boldness in its decisions. During its

¹²⁷ Article 62 of the EAC Treaty.

¹²⁸ Gatthi, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. At 264.

¹²⁹ Pallotti, A. 2013. Human Rights and Regional Cooperation in Africa: SADC and the Crisis in Zimbabwe. *Strategic Review for Southern Africa*. 35(1):29; Fritz, N. 2012. *Up in Smoke: The SADC Tribunal and the Rule of Law in the Region*. SAFPI Policy Brief No 11. September. Cape Town, South Africa: SAFPI. At 3 Available: http://www.safpi.org/sites/default/files/publications/SAFPI_Policy_Brief_11_0.pdf. [2013, December 3]; Scholtz, W. 2011. Review of the Role, Functions and Terms of Reference of the SADC Tribunal. *SADC Law Journal*. 1:201.

¹³⁰ Gatthi, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. At 264.

¹³¹ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 97.

¹³² Chief Frank Ukor v. Rachard Laleye. Case No. ECW/CCJ/APP/01/04. ECOWAS Court of Justice. Judgement from 27 May 2005. At 21. Available: http://www.worldcourts.com/ecowasccj/eng/decisions/2005.05.27_Ukor_v_Laleye.pdf. [2013, December 3].

¹³³ Hon. Dr. Jerry Ugokwe v. The Federal Republic of Nigeria. Case No. ECW/CCJ/APP/02/05. ECOWAS Court of Justice. Judgement from 7 October 2005. at 32. Available: <http://caselaw.ihrrda.org/doc/ecw.ccj.jud.03.05/view/>. [2013, December 3].

operational period from 2007 up until 2010, the Tribunal was very busy hearing cases brought against member states; out of 25 cases, 19 were against member states.¹³⁴ Despite its success and even due to its success, the SADC Summit decided on the Tribunal's de facto suspension on the 19th of May 2011. Business Day Live titled correctly that the “SADC Tribunal paid the price for threatening states' authority”¹³⁵. In the second case it heard, *Mike Campbell versus Republic of Zimbabwe*¹³⁶, the Tribunal decided that Mugabe's constitutional amendment that allows for the eviction of farmers of European origin without compensation and judicial review, was in violation of Articles 4 (c) and 6 (2) of the SADC Treaty. Zimbabwe was extremely unhappy with this decision and announced that it would not recognize the judgement.¹³⁷

It seems that a certain reluctance among member states to agree to the establishment of an effective legal system with strong organs can be detected. The idea of conferring national competences to a common institution is not very popular among African Heads of State and Government. When it comes to deciding on issues such as supremacy and direct applicability of laws made by the community, conferral of national competences to the community, submission to the power of a community Court of Justice, the provisions in the different treaties are at first scarce, and if existent, quite vague. However, the regional courts have proven that they “are not sleeping sentinels under the treaties under which they are established”¹³⁸, but prepared to enforce the treaties' provisions against national states' interests.

2.3.3.4 Community and State Relations

The AEC Treaty is signed by the 54 sovereign African states. Thus, the 54 “high contracting parties” are members of the AEC that they established among themselves

¹³⁴ Mkandawire, M. C. C. 2010. The SADC Tribunal Perspective on enforcement of judgements: State Support and Cooperation. *Commonwealth Law Bulletin*. 36(3): p. 568.

¹³⁵ Nevin, T. 2013. SADC Tribunal paid the Price for Threatening States' Authority. *Business Day Live*. 28 January. Available: <http://www.bdlive.co.za/world/africa/2013/01/28/sadc-tribunal-paid-the-price-for-threatening-states-authority> [2013, June 1].

¹³⁶ Mike Campbell (Pvt) Ltd and others v Republic of Zimbabwe. SADC (T) 02/2007.

¹³⁷ It is not the author's intention to discuss this case in any detail. For further information, please see: Scholtz, W. & Ferreira, G. 2011. Much Ado about Nothing? The SADC Tribunal's Quest for the Rule of Law Pursuant to Regional Integration. *Zeitschrift für öffentliches ausländisches Recht und Völkerrecht / Heidelberg International Law Journal*. 71:331; Scholtz, W. 2011. Review of the Role, Functions and Terms of Reference of the SADC Tribunal. *SADC Law Journal*. 1:197.

¹³⁸ Gathii, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. At 264.

according to Article 2 of the Treaty. The creation of a new legal system with its own organs by the high contracting parties of the Abuja Treaty resulted in a “juxtaposition of legal systems”¹³⁹ for the member states. Since the ratification of the Abuja Treaty, the member states of the AEC had to respect both the legal system of the community and their national legal systems. This situation raises the following legal questions that have to be discussed: How do these two legal systems interact? How do they relate to one another? The AEC Treaty contains a few provisions that deal with the legal relationship between the AEC and the national member states. Accordingly, it is necessary to dissect these provisions.

Article 3 (e) clarifies that the AEC legal system is distinct from the legal systems of the member states, and that the member states will adhere to the principle of the “[o]bservance of the legal system of the Community”.

Article 5 lists three general undertakings that all refer to the relationship between the Community and the member states. According to Article 5 (1), the member states engage in harmonizing their strategies and policies in order to develop the continental community and attain their objectives as set out in Article 4. The member states are obliged to refrain from any unilateral action that may hinder the attainment of these objectives. Article 5 (2) commands member states to take, in accordance with their constitutional procedures, all necessary measures to ensure the enactment and dissemination of such legislation that is necessary for the implementation of the provisions of the Treaty. Thus, member states are obliged to translate the obligations of the AEC Treaty into their national legislation and make the legal system of the Community effective. If member states do not conform to their obligations taken under the Treaty, they may be subjected to sanctions in accordance with Article 5 (3). Such sanctions may include “the suspension of rights and privileges of membership”. However, the system of sanctions does not seem very effective, because the Assembly has to agree on the sanctions upon recommendation of the Council. Thus, after recommendation from the Council, the Heads of State and Government of all member states have to come into agreement and sanction one “club-member”.¹⁴⁰

¹³⁹ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 82.

¹⁴⁰ Article 10 (4) of the AEC Treaty states that unless otherwise provided in the Treaty, decisions by the

Article 5 is only entitled “General Undertakings”, but the obligations that member states have assumed under this article are quite significant. By ratifying the Treaty, member states have made major concessions in favour of the establishment of the continental-wide economic community. They have accepted the mechanism of a community developing its own legal system that also has to be respected by their national legal systems. Although it seems at first glance to be a legal system next to the national system, Article 5 shows – without mentioning the word “supremacy” – that the new legal system enjoys priority. The overall objective of the Treaty is the establishment of the AEC, and member states have to subordinate their interests and legal national provisions under this omnipresent goal. The national legal systems must be brought into conformity with the AEC legal system.

The AEC legal system also disposes of an own Court of Justice. Article 18 (1) of the Treaty states that “[a] Court of Justice of the Community is hereby established”. Article 20 of the Treaty as well as Article 18 (2) of the CAAU refer to the adoption of a specific protocol for provisions on its statute, memberships, composition, functions and other relating issues. In 2003, the Protocol of the Court of Justice of the AU¹⁴¹ was adopted in Maputo, Mozambique. However, the Court of Justice of the AU has not – and will in all likelihood never – be put in place.¹⁴² To date, there is only the African Court on Human and Peoples' Rights (ACHPR), located in Arusha, Tanzania, that is operational since its judges were sworn in on the 2nd of June 2006. In 2009, it delivered its first judgement. In 2008, the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR)¹⁴³ was adopted in Sharm el-Sheikh, Egypt. This so-called Merger Protocol proposed the merger of the operational African Court on Human and Peoples' Rights and the still non-operational Court of Justice of the African Union. The desire to have a single court in the African Union that deals with economic issues and

Assembly shall be adopted by consensus, failing that, by two-third majority of Member States.

¹⁴¹ Protocol. Available:

http://www.au.int/en/sites/default/files/PROTOCOL_COURT_OF_JUSTICE_OF_THE_AFRICAN_UNION.pdf. [2013, June 1].

¹⁴² Viljoen, Frans. 2012. *AU Assembly Should Consider Human Rights Implications before Adopting the Amending Merged African Court Protocol*. Available: <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>. [2013, December 5].

¹⁴³ Protocol. Available:

http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf [2013, June 1].

human right issues is laudable, as it centralises competences and saves costs. However, it might also have negative consequences since there is no single court that focuses on economic integration matters. Until today, the political will to submit to binding interstate dispute-resolution mechanisms seems to lack among African governments, because the Merger Protocol has been ratified by only three AU member states, whereas 15 ratifications are necessary for its entrance into force.¹⁴⁴ In anticipation of the entrance into force of the Merger Protocol, the AUC prepared a second Merger Protocol. The Amending Merged Court Protocol foresees a third section to be incorporated into the Court. This section should deal with international crimes in Africa. The other two sections within the Court are first the General Affairs Section and secondly the Human Rights Section. Thus, the potential Court might become a tri-sectional or three-sections court in the end.¹⁴⁵

It is to be hoped that the ever-altering African regional judicial landscape is settled soon, because regional courts are extremely beneficial to a serious regional integration project. As Metcalf and Papageorgiou correctly state:

“Regional courts with wide jurisdiction strengthen the federal or common system. The court will have an interest in safeguarding the interests and integrity of the common system. Furthermore, [...] a court underlines that the common system is based on law and order and the respect for the rule of law.”¹⁴⁶

The EU and its European Court of Justice in Luxembourg, established in 1952, as well as its European Court of Human Rights in Strasbourg, established in 1959, have certainly served as a model for other regional courts, especially in Latin America and Africa.

¹⁴⁴ Viljoen, Frans. 2012. *AU Assembly Should Consider Human Rights Implications before Adopting the Amending Merged African Court Protocol*. Available: <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>. [2013, December 5].

¹⁴⁵ Viljoen, Frans. 2012. *AU Assembly Should Consider Human Rights Implications before Adopting the Amending Merged African Court Protocol*. Available: <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>. [2013, December 5].

¹⁴⁶ Nyman-Metcalf, K. & Papageorgiou, I. 2005. *Regional Integration and Courts of Justice*. Antwerpen – Oxford: Intersentia. At 107.

2.4 Conclusion

The historical overview shows that the African Union is an institution that developed over the years towards stronger mandates and capacities. The AU should be seen as the “latest incarnation of the idea of Pan-Africanism”¹⁴⁷. The Pan-African idea and the corresponding movement started as early as the end of the 19th century with the Pan-African Congress. This first phase of the institutionalisation of Pan-Africanism was followed by the second phase that consisted of the inauguration of the OAU. The third phase was the creation of the African Union.¹⁴⁸ As such, the AU's establishment is not the ultimate objective of Africa's integration and this process will always evolve towards ever closer political, economic and social cooperation among African peoples and deeper integration of the African continent.¹⁴⁹ The future will show if the AU is transformed from a relatively weak intergovernmental institution into a strong continental supranational institution or even a Pan-African union government – an institution “version 3.0”.

The presentation of the current legal framework for Africa's integration process evinces that it does not allow for effectively and coherently governing the relationships between the different institutions that are entrusted with the continent's integration. The lack of well-defined relations between Africa's integration actors slows down the whole Pan-African integration project. Although the adoption of the different legal documents that are supposed to clarify, strengthen and speed up the continent's integration process demonstrate that Africa is never short of new ideas. The ambitious objectives clash with the reality when it comes to the realisation and implementation of the new treaties, protocols and declarations. Thus, reforms are certainly recommendable; however, true political will from the African Heads of State and Government to internalise the reforms into the national laws is also critical. Chapter 4 on African solutions for the current African integration problem consisting in the “spaghetti bowl” of legal relations will provide for some ideas in this regard.

¹⁴⁷ Murithi, T. 2005. *The African Union: Pan-Africanism, Peacebuilding and Development*. Aldershot, England: Ashgate. At 8.

¹⁴⁸ Murithi, T. 2005. *The African Union: Pan-Africanism, Peacebuilding and Development*. Aldershot, England: Ashgate. At 8.

¹⁴⁹ Murithi, T. 2005. *The African Union: Pan-Africanism, Peacebuilding and Development*. Aldershot, England: Ashgate. At 26.

Chapter 3: Economic Partnership Agreements between African States and the European Union: Regime Complexity at its Best

3.1 Introduction

In addition to the complex web of legal relations between the economic integration actors on the African continent, the relationship between African states and international economic arrangements, such as the WTO, add another layer of legal complexity. This results in a certain density of economic integration regimes in Africa. Although Africa disposes of a specific and apparently unique character of institutional density on economic integration, the proliferation of bilateral and regional trade agreements is part of a wider international phenomenon of increased density of international institutions.¹⁵⁰ Against the background of the “spaghetti bowl” phenomenon worldwide, Alter and Meunier invented the term “international regime complexity” to discuss the origins and consequences of “the presence of nested, partially overlapping, and parallel international regimes that are not hierarchically ordered”¹⁵¹. The origins for international regime complexity can be very diverse.¹⁵² In the case of Africa's continental legal web, the AEC Treaty of 1991 called for the establishment of the AEC and counted on the support of old and new RECs to complete this objective. The founding treaties of the RECs date mostly from the 1980s and 1990s.¹⁵³ The AU was set up through the CAAU of 2002 to monitor the whole integration process. The RECs were all intended to be “parallel regimes”¹⁵⁴ leading towards the establishment of the AEC. According to the original idea of the Abuja Treaty, no direct or substantial overlap should exist, contrary to the multitude of RECs with overlapping mandates and memberships today. Nevertheless, the originally designed parallel regime RECs turned into overlapping regimes. Concerning the legal

¹⁵⁰ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 65.

¹⁵¹ Alter, K. & Meunier, S. 2009. The Politics of International Regime Complexity. *Perspective on Politics*. 7(1):13.

¹⁵² Alter, K. & Meunier, S. 2009. The Politics of International Regime Complexity. *Perspective on Politics*. 7(1):14.

¹⁵³ CEN-SAD from 1998, COMESA from 1994, EAC from 2000, ECCAS from 1983, ECOWAS from 1975, IGAD from 1986, SADC from 1992 and UMA from 1989.

¹⁵⁴ Alter, K. & Meunier, S. 2009. The Politics of International Regime Complexity. *Perspective on Politics*. 7(1):15.

relations between African states and the EU, the Economic Partnership Agreements were also intended to be parallel regimes. The ongoing negotiations of the EPAs, however, show that there is little parallelism in the original sense. Except for the CARIFORUM EPA, no EPA grouping corresponds to the envisaged African REC configuration. Thus, new regional groupings were set up – just for the EPA negotiations.

This chapter provides a brief outline of the history of the relationship between African and European states under the Lomé Regime up to the Cotonou Agreement and the EPAs. Moreover, this chapter analyses the legal framework for the EPAs and their relations with the RECs. Initially, EPAs were promised to solve Africa's “spaghetti bowl” problem of overlapping memberships and mandates, and to help Africa's regional integration process. EPAs were said to strengthen the RECs, thereby supporting and accelerating the process of regional integration in Africa. However, the analysis in this chapter will show that EPAs in their current forms are segmenting rather than unifying the African regions. Since the EPAs – although originally designed as parallel legal frameworks – do not respect the existing regional order as expressed through the eight recognised African RECs, the new FTA-like EPAs add another layer of legal provisions to the already complex regime multiplicity on the African continent.

3.2 Historical Context of the Relationship between African and European States

From 1975 up until the signing of the Cotonou Partnership Agreement in 2000, the relationship between the African, Caribbean and Pacific countries with the European Union was regulated by the so-called Lomé Regime. Under the Lomé Conventions I until IV bis (1975 – 2000), the ACP countries enjoyed non-reciprocal trade preferences from the EU. The signing of the Cotonou Agreement in 2000 marks a watershed in the longstanding ACP-EU relationship: the agreement paves the way to the EPA negotiations that implies a departure from preferential measures towards full reciprocity and the creation of many regional trade regimes, rendering the existence of the ACP countries as a single group less relevant than in previous times.¹⁵⁵ The historical overview will show the attempt on the part of the EU to move from a bilateral EU-ACP relationship towards an inter-regional partnership between the EU and the seven

¹⁵⁵ Abass, A. 2004. The Cotonou Trade Regime and WTO Law. *European Law Journal*. 10(4):439.

original ACP regions.

The ACP group came into existence with the signing of the Georgetown Agreement in 1975. Much to the surprise of the EU, 46 developing countries decided to form the ACP bloc, and started to negotiate their association agreement *en bloc* with the EU. This show of unity during the negotiations, which resulted in the first Lomé Convention, gave the ACP group significant leverage and power. Therefore, Lomé I, signed by the then nine European member states and the 46 ACP states, enshrined a unique and special relationship, marked by a number of favourable concessions accorded by the EU to the bloc of developing countries.¹⁵⁶ This spirit of Lomé – non-reciprocal and unilateral concessions – evaporated gradually during the renegotiations of Lomé I in Lomé II of 1980, Lomé III of 1985, Lomé IV of 1990 and Lomé IV bis of 1995.¹⁵⁷ However, throughout the whole duration of the Lomé regime, “the ACP States were seated at the top of the pyramid of preferences granted by the EC [European Communities]”¹⁵⁸.

With the establishment of the WTO under the Marrakesh Agreement in 1995, the Lomé Regime was exposed to increasing pressure. The new WTO aimed at establishing equality between developed and developing countries, which comprises of the majority of the ACP countries. Furthermore, it established an enforcement mechanism in the form of the Dispute Settlement Body (DSB).¹⁵⁹ Accordingly, in 1997 in its famous “Banana Case”¹⁶⁰, the Appellate Body held that the EU's regime for banana imports, and thus the preferential trade regime with the ACP group, was incompatible with its WTO obligations under Articles I (1) – most favoured nation treatment, III (4) – national treatment, XIII (1) – non-discriminatory application of quantitative restrictions – of the 1994 GATT, Article I (2) and (3) of the Imports Licensing Agreement, as well as Articles II and XVII of the GATS.¹⁶¹ The preferential measures – non-reciprocal and

¹⁵⁶ Flint, 2009. The End of a “Special Relationship”. The New EU – ACP Economic Partnership Agreements. *Review of African Political Economy*. 119:81.

¹⁵⁷ Carbone, M. 2013. Rethinking ACP-EU Relations After Cotonou: Tensions, Contradictions, Prospects. *Journal of International Development*. 25:744.

¹⁵⁸ Abass, A. 2004. The Cotonou Trade Regime and WTO Law. *European Law Journal*. 10(4):440.

¹⁵⁹ Abass, A. 2004. The Cotonou Trade Regime and WTO Law. *European Law Journal*. 10(4):442.

¹⁶⁰ On 5 April 1996, Ecuador, the United States, Guatemala, Honduras, and Mexico challenged the imports regime for bananas instituted by the EC although it was to some extent justified by the requirements of the Lomé IV Convention, which formed the basis of the EC's undertakings vis-à-vis ACP producers and suppliers.

¹⁶¹ European Communities—Regime applicable to the importation and distribution of bananas, Appeal

unilateral concessions – in terms of the Lomé Convention were indeed contrary to the core provision of the GATT consisting in the so-called most favoured nation principle of Article I (1)¹⁶². Moreover, Lomé's preferential treatment regime could not be legitimated by Article XXIV of the GATT relating to FTAs and CUs, in contrast to the claims advanced by the EC and certain of its ACP partners. The reason for this was that it constituted a unilateral form of trade liberalisation,¹⁶³ in breach of the reciprocity requirement set forth in Article XXIV (8) (b) of the GATT.¹⁶⁴ The “Banana Case” represents a landmark case as it marks “the end of a ‘special relationship’”¹⁶⁵. From the legal perspective, the metamorphosis of the longstanding ACP-EU non-reciprocal trade relationship is a consequence of the incompatibility between the Lomé Regime and the various articles of the GATT.¹⁶⁶

The Cotonou Agreement from 2000 takes into consideration Lomé's incompatibility with WTO law and calls for a “partnership” of equals, characterized by a lesser degree of specialty. The EU was determined to replace the universal approach inherent in the Lomé Conventions, negotiated with the ACP as a bloc, with six regionally-negotiated, WTO compliant trading regimes.¹⁶⁷ Although for the EU, the European Commission is the only actor entitled to negotiate international agreements on

Body (AB) Report and Special Group Reports, WT/DS27/R/USA, WT/DS27/R/ECU, WT/DS27/R/GTM and WT/DS27/R/HND (22 May 1997), as amended by AB Report, WT/DS27/AB/R (9 September 1997) adopted on 25 September 1997; Arbitration Report WT/DS27/15, 7th January 1998; Arbitration—EU appeal against Article 22:7 of Understanding, WT/DS27/ARB, 9 April 1999; Arbitration—EC Appeal against Article 22.6 of the Understanding, WT/DS27/ARB, 9 April 1999; SG Report- EC Appeal against Article 21:5, WT/DS27/RW/ECU (12 April 1999) adopted on 6 May 1999 and Arbitration—EC Appeal against Article 22:6 of Understanding, WT/SS27/ARB/ECU, 24 March 2000.

¹⁶² Article I (1) of the GATT commands that any trade advantages, such as low tariffs or high import quotas “granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties”.

¹⁶³ Matambalya, F. & Wolf, S. 2001. The Cotonou Agreement and the Challenges of Making the New EU-ACP Trade Regime WTO compatible. *Journal of World Trade*. 35(1):132.

¹⁶⁴ J. H. Mathis. 2002. *Regional Trade Arrangements in the GATT/WTO*. The Hague: T.M.C. Asser Press. At 89.

¹⁶⁵ Flint, 2009. The End of a “Special Relationship”. The New EU – ACP Economic Partnership Agreements. *Review of African Political Economy*. 119:79.

¹⁶⁶ Hodu, Y. N. 2009. Regionalism in the WTO and the Legal Status of a Development Agenda in the EU/ACP Economic Partnership Agreement. *Nordic Journal of International Law*. 78:226; Flint, A. 2009. The End of a “Special Relationship”. The New EU – ACP Economic Partnership Agreements. *Review of African Political Economy*. 119:83.

¹⁶⁷ Flint, A. 2009. The End of a “Special Relationship”. The New EU – ACP Economic Partnership Agreements. *Review of African Political Economy*. 119:79.

behalf of the EU¹⁶⁸, the EU did not want to continue negotiations with the ACP countries *en bloc*. Flint argues that the EU chose to build the post-Lomé strategy on regionalism because the WTO law provides for EPAs in the sense of agreements between regional blocs.¹⁶⁹ However, this is not an argument for the splintering of the ACP group as EPAs could also be negotiated between the EU as a regional bloc and the ACP group as a regional bloc. There is no need to break the ACP bloc into smaller regional blocs. Article 35 of the Cotonou Agreement highlights that “economic and trade cooperation shall be built on regional integration initiatives of ACP states, bearing in mind that regional integration is a key instrument for the integration of ACP countries into the world economy”. Nevertheless, there was no mandatory legal reason on the part of the WTO to replace the single Lomé regime with separate regional agreements for the ACP states.

EPA negotiations started as early as September 2002 and were meant to be concluded in December 2007.¹⁷⁰ The Cotonou Agreement foresaw that the EPAs between the EU and the sub-regions of the ACP were concluded by the end of 2007, when the waiver from the WTO, which allowed for the continuation of the unilateral trade regime, expired. The EU thought that its offer of EPAs as trade and development agreements should be accepted by the ACP states. However, the EU's conviction of EPAs as “something we are doing for them, not for us” was not shared by the ACP states.¹⁷¹ The EPA negotiations soon became frustrating for a number of reasons on both sides. As far as EPAs as a tool for Africa's regional integration are concerned, the EU – globally known for its support of regional integration – intended to conclude EPAs with the different regions of the ACP group in order to foster regional economic initiatives. The ACP bloc experienced the EU's approach as a “divide and conquer tactic”¹⁷² with “devastating effect on regional integration, the very basis of Africa's development

¹⁶⁸ Carbone, M. 2013. Rethinking ACP-EU Relations After Cotonou: Tensions, Contradictions, Prospects. *Journal of International Development*. 25:747.

¹⁶⁹ Flint, A. 2009. The End of a “Special Relationship”. The New EU – ACP Economic Partnership Agreements. *Review of African Political Economy*. 119:85.

¹⁷⁰ Carbone, M. 2013. Rethinking ACP-EU Relations After Cotonou: Tensions, Contradictions, Prospects. *Journal of International Development*. 25:747.

¹⁷¹ Pape, E. 2013. An Old Partnership in a New Setting: ACP-EU Relations from a European Perspective. *Journal of International Development*. 25:730 and 733.

¹⁷² McDonald, S. & Lande, S. & Matanda D. 2013. *Why Economic Partnership Agreements Undermine Africa's Regional Integration*. Wilson Center & Manchester Trade Collaboration. Washington D.C. At iv. Available: <http://www.wilsoncenter.org/sites/default/files/EPA%20Article.pdf> [2013, August 27].

strategy”¹⁷³. The EU's stated aim to reinforce Africa's integration process was not felt by the ACP countries.¹⁷⁴

Pape bluntly states that the criticism concerning the EU's dividing power is ill placed. She is not of the opinion that, by entering into partnerships with the regions, the EU will contribute to dividing the ACP group. Her explanation, however, that the same leaders who represent their countries in the ACP do so in the AU and regional EPAs and that they are best placed to decide on their relationship between the ACP group and its representative regional organisations¹⁷⁵, is not convincing. Flint opines that the ACP group is “in tatters”.¹⁷⁶ It is indeed difficult or even impossible for the concerned African Heads of State to commit to the different obligations under the EPAs on the one side and the different RECs on the other.

3.3 Legal Framework for Economic Partnership Agreements

There are currently four separate frameworks guiding the relations between the ACP countries and the EU¹⁷⁷: first, the “Generalised System of Preferences” (GSP) that allows developing country exporters to pay lower duties on their exports to the EU.¹⁷⁸ Secondly, the “Everything but Arms” (EBA) arrangement that is part of the GSP scheme and gives full duty-free and quota-free treatment to all least developed countries (LDCs).¹⁷⁹ Thirdly, the Trade and Cooperation Agreement between the EU and South Africa from 1999. Fourthly, the Cotonou Agreement which is the principal agreement,

¹⁷³ Ukpe, A. I. 2010. Will EPAs Foster the Integration of Africa Into World Trade? *Journal of African Law*. 54(2):212.

¹⁷⁴ Stevens, C. 2006. The EU, Africa and Economic Partnership Agreements: Unintended Consequences of Policy Leverage. *The Journal of Modern African Studies*. 44(3):441. Powell, S. 2007. Economic Partnership Agreements: Building or Shattering African Regional Integration? United Kingdom: Tradecraft. Available: http://www.tradecraft.co.uk/Resources/Traidcraft/Documents/PDF/tx/policy_EPAs_buildingafricanintegration.pdf. [2013, August 27].

¹⁷⁵ Pape, E. 2013. An Old Partnership in a New Setting: ACP-EU Relations from a European Perspective. *Journal of International Development*. 25:729.

¹⁷⁶ Flint, A. 2009. The End of a “Special Relationship”. The New EU – ACP Economic Partnership Agreements. *Review of African Political Economy*. 119:79.

¹⁷⁷ Hodu, Y. N. 2009. Regionalism in the WTO and the Legal Status of a Development Agenda in the EU/ACP Economic Partnership Agreement. *Nordic Journal of International Law*. 78:234.

¹⁷⁸ European Commission. 2013. *Generalised System of Preferences*. Available: <http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/>. [2013, November 20].

¹⁷⁹ Ukpe, A. I. 2010. Will EPAs Foster the Integration of Africa Into the World Trade? *Journal of African Law*. 54(2):215.

as it provides extensive trade preferences to African countries on a non-reciprocal basis.

3.3.1 WTO Compatibility of EPAs

As analysed above, WTO compatibility was the major justification given by the EU for the demise of the non-reciprocal and discriminatory Lomé regime. The EU argued that EPAs which fulfill the requirements concerning FTAs under Article XXIV GATT would be the best option to comply with WTO law.¹⁸⁰ The WTO law provides the legal foundation for RTAs on goods and services, and the WTO has mechanisms for notifying such agreements, reviewing them, and for monitoring their compliance with WTO law.¹⁸¹ This section together with the next section will question the EU's argumentation that the current legal form of EPAs was necessary for WTO compatibility.

Article XXIV (5) and (8) of the GATT allows WTO members to engage in discriminatory regionalism, i. e. create CUs and FTAs or conclude interim agreements leading to the latter, to the extent that those RTAs, among other conditions, fulfill the following substantial requirements of: first, covering “substantially all” the trade in goods among the members that constitute the RTA (internal requirement). Secondly, not introducing higher duties or other trade-distorting measures in respect of trade with third countries, except those that were in place before the formation of the FTA (external requirement). Thirdly, entering into force of the FTA within a “reasonable length of time” is another requirement.¹⁸² Furthermore, there is a procedural requirement in Article XXIV (7) (a) of the GATT which commands that the RTAs must be notified before the agreement enters into force. The notification enables all WTO members to control the agreement and challenge it before the DSB. The Appellate Body of the WTO established in “Turkey Textiles”¹⁸³ that the overall compatibility of FTAs on goods with

¹⁸⁰ Hurt, S. R. 2012. The EU-SADC Economic Partnership Agreement Negotiations: “Locking In“ the Neoliberal Development Model in South Africa? *Third World Quarterly*. 33(3):502.

¹⁸¹ Oppong, R. F. 2009. “Redefining the Relations between the African Union and the Regional Economic Communities in Africa” in: Bösl, A. & Erasmus, G. & Hartzenberg, T. & McCarthy, C. (eds). *Monitoring Regional Integration in Southern Africa Yearbook*. Stellenbosch, South Africa: TRALAC & Windhoek, Namibia: Konrad-Adenauer-Stiftung. At 7. Available: http://www.kas.de/wf/doc/kas_20303-1522-1-30.pdf?110125181230. [2013, December 30].

¹⁸² See Article XXIV (5) (b) and (8) (b) of the GATT.

¹⁸³ WTO. AB Report. 1999, October 22. Dispute DS34. Turkey Restrictions on Import of Clothing and Textiles. Available: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds34_e.htm. [2013, November 20].

Article XXIV of the GATT is subject to review by both the Committee on Regional Trade Agreements and the DSB.¹⁸⁴

As far as the procedural requirement is concerned, Eastern and Southern EPAs have not yet been notified.¹⁸⁵ The internal requirement calls for the coverage of a substantial portion of the trade within the newly established RTA. The requirement on the reciprocal liberalisation of “substantially all the trade” in Article XXIV (8) of the GATT is notoriously contested.¹⁸⁶ Neither the method of calculation nor the percentage figure to be reached following such a calculation is clear between the WTO members. In respect to the method, there is disagreement between existing as opposed to potential trade as reference point. Concerning the percentage, it is commonly said that at least 80 per cent of the volume of the existing trade between the parties must be fully liberalised.¹⁸⁷ The external requirement laid down in Article XXIV (5) (a) and (b) of the GATT that prohibits the imposition of trade barriers on third parties is more relevant to CUs and less to FTAs like EPAs which generally do not involve harmonisation of external trade policy.¹⁸⁸ While the internal requirement may also apply to interim agreements, the external requirement does not apply to FTAs in formation.¹⁸⁹

For EPAs to be WTO consistent under Article XXIV of the GATT, i. e. EPAs as FTAs between the EU and different African RECs, reciprocal liberalisation of at least 80 per cent of the trade volume is necessary. The old Lomé Regime with its unilateral preferences was indeed no longer justifiable under the WTO law. Thus, the original idea

¹⁸⁴ Kelly, R. 2008. *WTO Compatibility and the Legal Form of EPAs: A Case Study of Eastern and Southern Africa*. Working Paper No. 48-08. Inaugural Conference, Geneva. Society of International Economic Law. 15 – 17 July. At 16. Available at www.ssrn.com. [2013, November 20].

¹⁸⁵ Gathii, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. p. 136; Kelly, R. 2008. *WTO Compatibility and the Legal Form of EPAs: A Case Study of Eastern and Southern Africa*. Working Paper No. 48-08. Inaugural Conference, Geneva. Society of International Economic Law. 15 – 17 July. At 17. Available: www.ssrn.com. [2013, November 20].

¹⁸⁶ Bartels, L. 2007. *Legal Issues Relevant to the Notification of EPAs under Article XXIV GATT*. Available: http://www.acp-eu-trade.org/library/files/Bartels_EN_261007_Legal-issues-notification.pdf. [2013, November 20].

¹⁸⁷ Bartels, L. 2007. *Legal Issues Relevant to the Notification of EPAs under Article XXIV GATT*. Available: http://www.acp-eu-trade.org/library/files/Bartels_EN_261007_Legal-issues-notification.pdf. [2013, November 20].

¹⁸⁸ Kelly, R. 2008. *WTO Compatibility and the Legal Form of EPAs: A Case Study of Eastern and Southern Africa*. Working Paper No. 48-08. Inaugural Conference, Geneva. Society of International Economic Law. 15 – 17 July. At 17. Available: www.ssrn.com. [2013, November 20].

¹⁸⁹ Bartels, L. 2007. *Legal Issues Relevant to the Notification of EPAs under Article XXIV GATT*. Available: http://www.acp-eu-trade.org/library/files/Bartels_EN_261007_Legal-issues-notification.pdf. [2013, November 20].

of EPAs between the EU and RECs as parallel regimes on top of the already existing RECs was not only compatible with the multilateral trade provisions, but also logical. Unfortunately, the execution of this idea lacks logical coordination as the second next section will show.

3.3.2 Alternatives to the Economic Partnership Agreements

Besides justifying EPAs as FTAs according to Article XXIV GATT, there are two other possibilities to make the African-European relationship WTO compatible: first, obtaining a waiver for the EPAs under Article IX (3) and (4) of the GATT; secondly, justifying the new agreements under the Enabling Clause. It seems that the EU has deliberately forgotten about these alternative approaches to EPAs, although the Cotonou Agreement makes clear, in Article 37 (5) and (6), that EPAs will only be negotiated with ACP countries that “consider themselves in a position to do so” and that the EU would commit itself to examine “all alternatives possibilities”.¹⁹⁰

From the outset, the EU announced that the waiver requested for the Cotonou Agreement that expired by the end of 2007 would be the last covering EU-ACP relations.¹⁹¹ The European Commission was not interested in another waiver for the EPAs. It argued that the chances for extending the waiver or requesting a new one were minimal and if it were possible the political costs would be too high.¹⁹² Furthermore, a waiver is overly sensible to change¹⁹³, in other words unstable, because it is reviewed annually by the WTO and subject to legal challenge by any WTO member.

Justifying EPAs under the Enabling Clause was rejected by the EU as well. Since the 1970s, most industrialised countries have accorded discriminatory market access to products originating in developing countries by way of GSP schemes. The

¹⁹⁰ Flint, A. 2009. The End of a “Special Relationship”. *The New EU – ACP Economic Partnership Agreements. Review of African Political Economy*. 119:89.

¹⁹¹ Gathii, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. At 134; Kelly, R. 2008. *WTO Compatibility and the Legal Form of EPAs: A Case Study of Eastern and Southern Africa*. Working Paper No. 48-08. Inaugural Conference, Geneva. Society of International Economic Law. 15 – 17 July. At 4. Available: www.ssrn.com. [2013, November 20].

¹⁹² Hodu, Y. N. 2009. Regionalism in the WTO and the Legal Status of a Development Agenda in the EU/ACP Economic Partnership Agreement. *Nordic Journal of International Law*. 78:238.

¹⁹³ Kelly, R. 2008. *WTO Compatibility and the Legal Form of EPAs: A Case Study of Eastern and Southern Africa*. Working Paper No. 48-08. Inaugural Conference, Geneva. Society of International Economic Law. 15 – 17 July. At 1. Available: www.ssrn.com. [2013, November 20].

WTO permits its members to engage in such preferential trade agreements under certain conditions.¹⁹⁴ The EU could have used the GSP regime for ACP countries. However, the GSP scheme carries disadvantages for both sides, African and European: For African countries, the inconvenience is that the general European Union GSP scheme is available to all developing countries. Thus, it does not place African developing countries in a privileged position as compared to all the other developing countries worldwide. The creation of a special GSP scheme limited to ACP countries only could very likely be challenged successfully by any other developing country. In “EC Tariff Preferences”, the Appellate Body of the WTO's Dispute Settlement Mechanism examined the extent to which GSP donors – in this case the former European Communities – are entitled to differentiate between developing countries – in this case Pakistan and India – for non-trade reasons.¹⁹⁵ This case shows that donor countries have to treat developing countries in similar situations in a similar way; donor countries are not allowed to concede preferences in a discriminatory way, i. e. only to certain developing countries. Thus, a special GSP regime for ACP countries would have to include all the remaining developing countries with comparable developmental status to the African states. For the EU, the inconvenience is that the GSP system concedes preferential treatment unilaterally, i. e. based on the principle of non-reciprocity. The EU, however, is interested in the reciprocity of its trade relations and having full access to African countries because ACP products increase in importance as vital resources, such as minerals, become scarce.¹⁹⁶

3.3.3 Africa's EPA Groupings vis-à-vis its Existing RECs

Originally, the EPAs were negotiated between the EU and four African groupings: Central Africa (CEMAC); Eastern and Southern Africa (ESA / COMESA) West Africa (ECOWAS / Union Économique et Monétaire Ouest Africaine –

¹⁹⁴ Hodu, Y. N. 2009. Regionalism in the WTO and the Legal Status of a Development Agenda in the EU/ACP Economic Partnership Agreement. *Nordic Journal of International Law*. 78:234.

¹⁹⁵ WTO. AB Report. EC Tariff Preferences. WT/DS246/AB/R. 7 April 2004. § 3. Available: http://www.wto.org/english/tratop_e/dispu_e/repertory_e/e1_e.htm. [2013, November 20].

¹⁹⁶ Gathii, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. At 136; Kelly, R. 2008. *WTO Compatibility and the Legal Form of EPAs: A Case Study of Eastern and Southern Africa*. Working Paper No. 48-08. Inaugural Conference, Geneva. Society of International Economic Law. 15 – 17 July. At 15. Available: www.ssrn.com. [2013, November 20].

UEMOA); and Southern Africa (SADC).¹⁹⁷ From the beginning, the memberships of the EPA negotiating groups were not the same as the memberships of the RECs recognised by the AU. The ACP EPA countries group themselves into seven regions – five in Africa, one in the Caribbean and one in the Pacific.¹⁹⁸ In the course of the negotiations, several groups split and formed new groups. The negotiations became more and more complex and complicated.¹⁹⁹

The European Commission provides an overview of the ongoing EPA negotiations on its homepage that is updated in line with the progress in the negotiations.²⁰⁰ This overview clearly shows that until the last update in October 2013 there has been only one final EPA concluded. Only the Caribbean Forum (CARIFORUM) group of states concluded a full regional EPA encompassing cooperation in trade-related areas and liberalisation in goods and services, in 2008. The agreement concerns 15 ACP partners in the Caribbean zone. Haiti, the only LDC in the zone, joined the process at a later stage and added its signature in December 2009.²⁰¹ Thus, the CARIFORUM EPA represents the successful potential outcome of EPA negotiations that the other ACP groups should aspire to. In the meantime, the African ACP groups have only concluded interim EPAs. However, there are several countries that have not yet signed or ratified these agreements, others are not yet applying them.

3.4 Prospects of the Relationship

Currently, the ACP countries that failed to initial interim EPAs now resort to the GSP and the EBA, depending on whether the country is classified as a developing country or LDC. Developing countries can trade with the EU under the GSP, while

¹⁹⁷ Ukpe, A. I. 2010. Will EPAs Foster the Integration of Africa Into the World Trade? *Journal of African Law*. 54(2):216.

¹⁹⁸ European Commission. 2010. *Countries and Regions – ACP*. Available: <http://ec.europa.eu/trade/policy/countries-and-regions/regions/africa-caribbean-pacific/>. [2013, November 20].

¹⁹⁹ Ukpe, A. I. 2010. Will EPAs Foster the Integration of Africa Into the World Trade? *Journal of African Law*. 54(2):216 – 218.

²⁰⁰ European Commission. 2013. *Overview of EPA Negotiations – Updated 16 October 2013*. Available: http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf. [2013, November 20].

²⁰¹ German Marshall Fund of the United States. 2011. *Economic Partnership Agreements and African Regional Integration: Have Negotiations Helped or Hindered Regional Integration?*. Issue Brief. August 2011. USA: German Marshall Fund of the United States. At 8. Available: http://www.gmfus.org/wp-content/blogs.dir/1/files_mf/1325339399_magicfields_attachment__1_1.pdf. [2013, August 27].

LDCs can trade with the EU under the EBA.²⁰²

According to WTO law, non-reciprocal treatment is only allowed towards LDCs. Currently, 34 African countries are listed as LDCs: Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Democratic Republic Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Somalia, Uganda and Zambia.²⁰³ Those countries can trade with the EU under the EU's EBA arrangement. This arrangement was born in 2001 to give all LDCs full duty-free and quota-free access to the EU for all their exports except arms and armaments. It represents the most generous form of preferential treatment to LDCs globally.²⁰⁴ The problem for the EPA negotiations now is that LDCs are not interested in negotiating uniform provisions for them and their non-LDC neighbours within their REC as the potential uniform provisions of an EPA would not offering them anything better than the non-binding, unilateral measures contained in the EBA.²⁰⁵ The EU wants to convince developing countries and LDCs that EPAs do offer better conditions in the long run. Problems might indeed surge soon, because the GSP scheme that incorporates the EBA consists of non-binding, unilateral measures. Accordingly, the EU has the right to withdraw or modify its concessions at any time. This makes the measures highly insecure. Furthermore, the EU as the donor determines the eligibility of recipients and products as well as the rules and exceptions of the scheme. Moreover, the GSP includes very strict and costly rules of origin that the beneficiary countries have to manage.²⁰⁶ The EU uses these arguments against the GSP and EBA to bring developing and LDCs

²⁰² Ukpe, A. I. 2010. Will EPAs Foster the Integration of Africa Into World Trade? *Journal of African Law*. 54(02):215; Stevens, C. 2006. The EU, Africa and Economic Partnership Agreements: Unintended Consequences of Policy Leverage. *Journal of Modern African Studies*. 44(3):454.

²⁰³ European Commission. 2013. *EBA Factsheet*. At 2. Available: http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151704.%2013-07%20EBA%20Factsheet%20Update%20Final.pdf. [2013, November 20].

²⁰⁴ European Commission. 2013. *EBA Factsheet*. At 1. Available: http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151704.%2013-07%20EBA%20Factsheet%20Update%20Final.pdf. [2013, November 20].

²⁰⁵ Ukpe, A. I. 2010. Will EPAs Foster the Integration of Africa Into World Trade? *Journal of African Law*. 54(02):215.

²⁰⁶ Ukpe, A. I. 2010. Will EPAs Foster the Integration of Africa Into World Trade? *Journal of African Law*. 54(02):215.

back to the negotiation table of the EPAs.

The future will tell if the EU can convince countries of different development levels within a REC to come together and negotiate uniform provisions. For this result, developing and LDCs would have to give up their preferential status and allow for reciprocity beyond the WTO requirements.²⁰⁷

3.5 Conclusion

As the historical overview indicates, there is a tendency on the part of the AU and the EU to move from a bilateral AU-EU relationship towards an inter-regional and multilateral Africa-Europe partnership. The “Banana Case” initiated the departure from the preferential treatment towards full reciprocity under the EPAs. The EU took the WTO decision as an excuse to start the negotiations of the EPAs as FTAs in conformity with Article XXIV GATT. The alternative approaches to regulate the relations between the EU and ACP states – waiver and Enabling Clause – do not represent a solution in the long run, as analysed above. However, the current EPA negotiations are frustrating for both sides – EU and Africa.

The analysis on the legal framework for EPAs and the relationship between the EPAs and RECs shows that the EPA negotiation process resulted in segmenting rather than unifying the African regions. The initially as parallel legal frameworks designed EPAs do not respect the existing African regional order as expressed through the current eight recognised African RECs. Thus, the FTA-like EPAs add another layer of legal provisions to the already complex regime multiplicity on the African continent.

After all, ACP states now pursue trade negotiations in very different groupings and constellations at three levels – in the WTO, with the EU and within their regional trade communities. These heterogenous negotiations consume time, costs and competent negotiators, and make the whole process confusing and ineffective.²⁰⁸

However, as the EU keeps on stating, EPAs could be mutually beneficial, if they were negotiated correctly, i. e. consistent with the existing RECs or at least ACP groupings as real parallel regimes.

²⁰⁷ Marx, M. T. 2000. *Perspektiven der regionalen Entwicklungsprozesse in Afrika*. KAS-AI 9/00. At 67. Available: http://www.kas.de/wf/doc/kas_1688-544-1-30.pdf. [2013, November 20].

²⁰⁸ Hurt, S. R. 2012. The EU-SADC Economic Partnership Agreement Negotiations: “Locking In” the Neoliberal Development Model in South Africa? *Third World Quarterly*. 33(3):504.

Chapter 4: Recommendations: African Solutions for the Current African Integration Problem

4.1. Introduction

The multiple and overlapping memberships of African RECs are a reflection of the large number of bilateral and regional trade agreements, and of the character of African RECs as “flexible legal regimes”²⁰⁹. Gathii argues that African RECs in their current constellation with numerous overlapping memberships and mandates are “flexible legal regimes” demonstrating Africa's diversity which is not only negative, but also beneficial to the regional integration process.²¹⁰ According to Gathii, African RECs are trade-plus regimes that combine a significant variety of objectives like sharing ports, water basins and trade routes, and managing security issues.²¹¹ Therefore, multiple memberships offer member states benefits that would not be available if they belonged to only one REC. However, Gathii also admits that the current constellation of African RECs is hampering the establishment of the AEC, which was the *raison d'être* of the RECs in the beginning.²¹² Later on, the RECs became “stumbling blocs” instead of being “building blocs” of the continent-wide AEC. The occurrence that Jagdish Bhagwati has referred to as the “spaghetti bowl” of legal relations²¹³ is part of Africa's integration problem. The inefficiency and ineffectiveness of the regime multiplicity on the African continent was officially recognised by the AU in its report on regional integration in Africa from 2006 – ARIA II²¹⁴ – and the issue is still unresolved as the

²⁰⁹ Gathii, J. T. 2010. African Regional Trade Agreements as Flexible Legal Regimes. *North Carolina Journal of International Law and Commercial Regulation*. 35:571.

²¹⁰ Gathii, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. At xxx, xxxi, 65 and 66.

²¹¹ Gathii, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. At xxx, xxxi, 69 and 72; Gathii, J. T. 2010. African Regional Trade Agreements as Flexible Legal Regimes. *North Carolina Journal of International Law and Commercial Regulation*. 35:593.

²¹² Gathii, J. T. 2011. *African Regional Trade Agreements as Legal Regimes*. Cambridge, UK: Cambridge University Press. At xxx, xxxi and 76.

²¹³ Bhagwati, J. 1995. “U.S. Trade Policy: The Infatuation with Free Trade Areas” in: Bhagwati, J. & Krueger, A. O. (eds). *The Dangerous Drift to Preferential Trade Agreements*. Washington D.C., USA: AEI Press.

²¹⁴ United Nations Economic Commission for Africa. 2006. *Assessing Regional Integration in Africa II, Rationalising Regional Economic Communities*. Addis Ababa, Ethiopia: UNECA. At 45 and 59 – 65. Available: http://www.uneca.org/sites/default/files/publications/aria2_eng.pdf. [2013, December 20].

reports from 2012 (ARIA V)²¹⁵ and 2013 (ARIA VI)²¹⁶ show. Already in 2006, the UNECA and the AU proposed different scenarios for the rationalisation of the RECs in order to accelerate the establishment of the AEC. With the start of the negotiations of the COMESA-EAC-SADC Tripartite in 2008, the debate on rationalisation of the RECs and acceleration of the AEC gained new momentum and allowed for the hope that the “bowl of spaghetti” will turn into a “dish of cannelloni”²¹⁷.

This chapter attempts to provide African solutions for the current ineffective and inefficient system of Africa's regional integration process. Thabo Mbeki correctly stated that it is “Africa's right and duty to resolve its own problems”²¹⁸. In this regard, it is important that the African leadership discovers the solutions that best resolve their problems and take responsibility for their actions. It would be very counterproductive, if the solutions were seen as provided by “Western imperial powers, determined to pursue their strategic objective [...], which is to transform all other countries into their neo-colonies, wherever and whenever possible”²¹⁹. Needless to say, it is not the intention to generate European-minded lessons, because law is ideally not generated by outsiders who say: We have this law and you should have it, too. Therefore, the objective of this chapter is to raise an inventory of potential solutions that mostly have been envisaged by African institutions and academics, and analyse their legal feasibility and value. Not forgetting that Africa deserves laws that its people will embrace as sympathetic and legitimate rather than reject as foreign, it will be found that the solution to Africa's integration problem is threefold: reforms have to take place at the continental level by empowering the AU and its organs and institutions, at the regional level by strengthening and rationalising the RECs, and at the national level by engaging heads of

²¹⁵ United Nations Economic Commission for Africa. 2012. *Assessing Regional Integration in Africa V, Towards an African Continental Free Trade Area*. Addis Ababa, Ethiopia: UNECA. Available: http://www.uneca.org/sites/default/files/publications/aria5_print_uneca_fin_20_july_1.pdf. [2013, December 20].

²¹⁶ United Nations Economic Commission for Africa. 2013. *Assessing Regional Integration in Africa VI, Harmonising Policies to Transform the Trading Environment*. Addis Ababa, Ethiopia: UNECA. Available: http://www.uneca.org/sites/default/files/publications/aria_vi_english_full.pdf. [2013, December 20].

²¹⁷ Draper, P. & Halleson, D. & Alves, P. 2007. *SACU, Regional Integration and the Overlap Issue in Southern Africa: From Spaghetti to Cannelloni?* Trade Policy Report No. 17. Johannesburg, South Africa: South African Institute of International Affairs. Available: http://sarpn.org/documents/d0002411/SACU_SAIIA_Jan2007.pdf. [2013, December 20].

²¹⁸ Mbeki, T. 2013. The African Union at Ten Years Old: A Dream Deferred! *African Insight*. 42(3):21.

²¹⁹ Mbeki, T. 2013. The African Union at Ten Years Old: A Dream Deferred! *African Insight*. 42(3):21.

state and government who will comply with their obligations under their corresponding RECs and the AU. Strengthening Africa's integration agents seems to not only be in line with the treaties on the African integration project, but also with the plans of the AUC and its new chairperson, Dr. Dlamini Zuma²²⁰, in this epoch of African renaissance. Additionally, the different relations between these integration actors have to be managed in a coherent way. In this regard, Oppong's warning that “an economic community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness”²²¹ cannot be repeated too often.

4.2. Continental Level: Empowering the AU and its Organs and Institutions

4.2.1 The AU as Potential Supranational Institution

Abdul Mohammed poses the question, “What will it take to create an effective African Union?”, and discusses the answer to this difficult question under the following three aspects – “participation, institutions, and leadership”.²²² The AU has the challenge of serving as a monitoring body for the relations with the RECs in their mission to establish the AEC, and the relations with its 54 African member states.²²³ The UNECA recommends that “[s]upported by member states, the AU should act as leader in integration”.²²⁴

Although the CAAU indicates that the AU possesses supranational powers, the

²²⁰ Dlamini Zuma, N. 2013. Welcome Remarks. Opening Session of the 20th Ordinary Session of the Assembly of Heads of State and Government of the AU. Addis Ababa, Ethiopia. 27 January. Available: [http://cpauc.au.int/en/sites/default/files/AUC%20Chairperson%20Statement%20to%2020th%20Assembly%20\(Final\).pdf](http://cpauc.au.int/en/sites/default/files/AUC%20Chairperson%20Statement%20to%2020th%20Assembly%20(Final).pdf). [2013, December 20]; Dlamini Zuma, N. 2013. Statement at the 10th AU-RECs-ECA-AfDB Coordination committee Meeting. Addis Ababa, Ethiopia. 23 January. Available: http://cpauc.au.int/en/sites/default/files/REC%20Coordination%20Meeting%20STATEMENT%2023%20January%202013%20Addis%20Ababa_0.pdf. [2013, December 20].

²²¹ Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. New York: Cambridge University Press. At 2.

²²² Mohammed, A. “Toward an Effective African Union: Participation, Institutions, and Leadership” in: Adejumbi, S. & Olukoshi, A. (eds). 2008. *The African Union and New Strategies for Development in Africa*. Amherst, NY, USA: Cambria Press. At 59.

²²³ According to Article 3 (1) of the CAAU, the AU's role is to “coordinate and harmonize policies between existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union”.

²²⁴ United Nations Economic Commission for Africa. 2012. *Assessing Regional Integration in Africa V, Towards an African Continental Free Trade Area*. Addis Ababa, Ethiopia: UNECA. At 23. Available: http://www.uneca.org/sites/default/files/publications/aria5_print_uneca_fin_20_july_1.pdf. [2013, December 20].

member states' governments and heads of state continue to assert that it remains an association of sovereign states.²²⁵ The AU member states clearly expressed their understanding that the AU, like the OAU, is not a supranational organisation, when they acceded to the Union.²²⁶ Ten years after the establishment of the AU, this understanding has mostly not changed. Therefore, the AU will have to persuade its member states to cede some of their sovereignty and that membership of the AU implies sharing sovereignty in key areas of lawmaking.

As the EPA negotiations demonstrated, the AU was unable to monitor the process. While the EU talks in unison to all African groupings, the African RECs and new groups do not talk much to each other, but instead carry the negotiations in a quite competitive spirit with virtually no coordination between them.²²⁷ The established African regional configurations were nearly all unable to find common negotiating positions. Thus, they ended up splitting into new groupings due to the influence of an external actor – the EU. For future negotiations, the AU should provide a forum for the RECs to meet and discuss their positions before talking to the EU. The AU should encourage the RECs to negotiate in their regional communities for the benefit of all member states and coordinate the negotiation process where necessary. To fulfill this challenging task, the AU must be a strong and powerful organisation.

4.2.2 The AU's Organs and Institutions

The CAAU of 2000²²⁸ established 17 key organs and institutions, some of which have overlapping mandates, while others represented aspirations for future integration rather than serving present needs.²²⁹ The set of institutions was clearly modelled on the

²²⁵ Mohammed, A. 2008. "Toward an Effective African Union: Participation, Institutions, and Leadership" in: Adejumbi, S. & Olukoshi, A. (eds). *The African Union and New Strategies for Development in Africa*. Amherst, NY, USA: Cambria Press. At 63.

²²⁶ Mohammed, A. 2008. "Toward an Effective African Union: Participation, Institutions, and Leadership" in: Adejumbi, S. & Olukoshi, A. (eds). *The African Union and New Strategies for Development in Africa*. Amherst, NY, USA: Cambria Press. At 67.

²²⁷ Ukpe, A. I. 2010. Will EPAs Foster the Integration of Africa Into World Trade? *Journal of African Law*. 54(02):216.

²²⁸ Articles 5 through 22 of the CAAU define and describe the AU's organs and institutions.

²²⁹ Adebajo, A. & Paterson, M. (eds). 2012. *The AU at Ten: Problems, Progress, and Prospects*. International Colloquium Report. 30 – 31 August. Berlin, Germany. At 3. Cape Town, South Africa: Centre for Conflict Resolution. Available: http://www.ccr.org.za/images/pdfs/vol41_au_at_ten_6may2013.pdf. [2013, December 20].

EU.²³⁰ However, the distinctive feature of the African counterparts is their “relative powerlessness”²³¹. Thus, it is important to translate the provisions of the CAAU and different protocols and declarations into reality and make the institutions strong as the following examples demonstrate.

4.2.2.1 The AU Commission in Addis Ababa, Ethiopia

The AU Commission in Addis Ababa, Ethiopia, is the central institution of the AU. Thus, it needs to be well equipped – operationally and financially. The competence and expertise of the chairperson are crucial, as well as those of the commissioners and other senior officers. Currently, the Commission's effectiveness is hampered by low staff levels: it employed 669 people in 2012, compared to more than 33,000 employees at the EU in the same year.²³² However, the Commission elected a new competent chairperson in 2012, Dr. Dlamini-Zuma. Nkosazana Clarice Dlamini-Zuma, the first female president of this institution, stands for change and is supposed to lead the AU into a second transition resulting in a strong and powerful AUC.

In this epoch of African renaissance, the AUC should fully play its role as coordinator at the continental level and ensure a minimum level of harmonization between the RECs programmes in all sectors towards achieving the AEC. Reinforcing the principle of subsidiarity and strengthening the institutional relations between the concerned institutions is essential for the sustainability of the integration process in Africa.²³³ Saurombé suggests even to transform the African Union Commission into the African Union Authority to reflect its improved mandate with increased powers to monitor the whole African integration process.²³⁴ At the AU Summit in Addis Ababa in 2009, the AU

²³⁰ Fagbayibo, B. 2011. Rethinking the African Integration Process: A Critical Politico-Legal Perspective on Building a Democratic African Union. *SAYIL*. 36:217.

²³¹ Adebajo, A. & Paterson, M. (eds). 2012. *The AU at Ten: Problems, Progress, and Prospects*. International Colloquium Report. 30 – 31 August. Berlin, Germany. At 23. Cape Town, South Africa: Centre for Conflict Resolution. Available: http://www.ccr.org.za/images/pdfs/vol41_au_at_ten_6may2013.pdf. [2013, December 20].

²³² Adebajo, A. & Paterson, M. (eds). 2012. *The AU at Ten: Problems, Progress, and Prospects*. International Colloquium Report. 30 – 31 August. Berlin, Germany. At 2. Cape Town, South Africa: Centre for Conflict Resolution. Available: http://www.ccr.org.za/images/pdfs/vol41_au_at_ten_6may2013.pdf. [2013, December 20].

²³³ African Union Commission. *Status of Integration in Africa IV (SIA IV)*. 2013. Addis Ababa, Ethiopia: African Union Commission. At 172. Available: [http://www.au.int/en/sites/default/files/SIA%202013\(latest\)_En.pdf](http://www.au.int/en/sites/default/files/SIA%202013(latest)_En.pdf). [2013, December 20].

²³⁴ Saurombe, A. 2012. An Analysis of Economic Integration in Africa with specific reference to the African Union and the African Economic Community. *SAPL*. 27:303.

Commission itself suggested that one should consider transforming the AU Commission into an AU Authority with more power than the former.²³⁵ This suggestion stopped the “Grand Debate” on the acceleration of the economic and political integration, and the formation of a Union Government with the ultimate objective of creating the United States of Africa.²³⁶ The new debate on whether the CAAU had to be amended in order to realise the AU Authority ended without precise results. Even if with or without a new name, the AU has to take up its role as the coordinating agency and to control the process of economic (and political) integration on the continent.²³⁷

4.2.2.2 The Pan-African Parliament (PAP) in Midrand, South Africa

The AU inaugurated the Pan-African Parliament (PAP) on the 18th March of 2004 to foster the role of civil society in its work.²³⁸ Unlike the ultimate aim of the PAP as stated in Article 2 (3) of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament²³⁹, the PAP is still a purely advisory and consultative body and its deputies are still appointed from their national parliaments.²⁴⁰ According to Article 25 of the Protocol, a review of the Protocol was due in 2009 to ensure the translation of its objectives. The objectives of Articles 2 (3) and 3 of the Protocol are not yet realised. Thus, the PAP should indeed accelerate its evolution into the envisaged supranational legislative organ, whose deputies are elected by universal adult suffrage. This entails that the national member states of the AU cede some of their sovereignty to the AU. For the effectiveness and legitimacy of the PAP, the Parliament needs extensive competences. Furthermore, the deputies will have to be elected directly by the African citizens. Then, the deputies will have a direct mandate

²³⁵ AU. 2009. Decision on the Special Session of the Assembly on the Union Government. Addis Ababa, Ethiopia. 1 – 3 February. Assembly/AU/Dec. 233 (XII).

²³⁶ Welz, M. 2013. Integrating Africa. Decolonization's Legacies, Sovereignty and the African Union. New York, USA: Routledge. At 4.

²³⁷ v. Soest, C. 2008. *Wacklige “Bausteine“ und schwache “Maurer“: Die Afrikanische Union hat ein Integrationsproblem*. GIGA German Institute of Global and Area Studies. Nr. 4. At 7. Available: http://www.giga-hamburg.de/de/system/files/publications/gf_afrika_0804.pdf. [2013, December 3].

²³⁸ Murithi, T. 2005. *The African Union: Pan-Africanism, Peacebuilding and Development*. Aldershot, England: Ashgate. At 102.

²³⁹ Available: http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/protocol-panafrican-parliament.pdf. [2013, December 20].

²⁴⁰ Adebajo, A. & Paterson, M. (eds). 2012. *The AU at Ten: Problems, Progress, and Prospects*. International Colloquium Report. 30 – 31 August. Berlin, Germany. At 23. Cape Town, South Africa: Centre for Conflict Resolution. Available: http://www.ccr.org.za/images/pdfs/vol41_au_at_ten_6may2013.pdf. [2013, December 20].

and the PAP as a democratic institution will become visible and accessible to all African citizens throughout the continent.²⁴¹

Since RECs also dispose of sub-regional parliaments, the PAP has to establish a working relationship with the legislative organs of the RECs.²⁴² In this regard, it makes sense to establish the principle of subsidiarity that is mostly used in federative or supranational entities – like for example Germany or the European Union – according to which laws are made by the lowest organ possible and then deferred to a higher organ only in the case that the issue is relevant for more addressees or if the laws need to be harmonised within a certain area. The African Union is aware of the importance of this principle. In one report on the governance of integration, the AU highlights that “when exercising its powers, the Community [AEC] must leave Member States, and indeed, RECs, certain responsibilities, which can best be performed by them”²⁴³. Respecting subsidiarity in the African integration process is crucial, because the regional administrations have to be given the authority and the power to implement their regional agenda as well as to translate the Community laws in order not to lose their credibility as operational and necessary agencies between the national and continental level.²⁴⁴

4.2.2.3 The Court of Justice for the AU in Arusha, Tanzania

The AU lacks a body with the power to enforce its decisions. If AU member states do not comply on a voluntary basis with the provisions and decisions of the AU, the AU does not have in place a mechanism for enforcement. The Abuja Treaty as well as the CAAU established the Court of Justice of the Community, later called the Court of Justice of the Union.²⁴⁵ This Court was never operational though, and its potential operationalisation was overtaken by a 2008 agreement to merge with the African Court

²⁴¹ Mohammed, A. 2008. “Toward an Effective African Union: Participation, Institutions, and Leadership” in: Adejumbi, S. & Olukoshi, A. (eds). *The African Union and New Strategies for Development in Africa*. Amherst, NY, USA: Cambria Press. At 76.

²⁴² Mohammed, A. 2008. “Toward an Effective African Union: Participation, Institutions, and Leadership” in: Adejumbi, S. & Olukoshi, A. (eds). *The African Union and New Strategies for Development in Africa*. Amherst, NY, USA: Cambria Press. At 78.

²⁴³ African Union. *Governance of Integration in Africa: Challenges and Way Forward*. § 35. Available: <http://au.int/en/sites/default/files/Issue%20paper%20on%20Governance%20of%20Integration%20%20en.pdf>. [2013, July 2].

²⁴⁴ African Union. *Governance of Integration in Africa: Challenges and Way Forward*. § 36. Available: <http://au.int/en/sites/default/files/Issue%20paper%20on%20Governance%20of%20Integration%20%20en.pdf>. [2013, July 2].

²⁴⁵ Article 18 (1) of the AEC Treaty and Article 18 (1) of the CAAU.

on Human and Peoples' Rights.²⁴⁶ In terms of the Merger Protocol, the seat of the new single Court will be the same as the seat of the African Court on Human and Peoples' Rights.²⁴⁷ However, only five countries had ratified the founding protocol for the new merged court by March 2013, far short of the 15 required.²⁴⁸ Indeed, Africa's governance framework relies on voluntary compliance. If the cooperation of member states is withheld, the system is undermined.²⁴⁹

When the Merger Protocol is ratified by 15 member states, it will enter into force.²⁵⁰ If this multi-purpose Pan-African court ever functions, it appears that, conforming to Article 29 (1) read together with Article 30 of the current Merger Protocol, individuals, including consumers, traders and corporate companies, will not be able to file any claims on economic issues. Individuals only have *locus standi* for human rights issues, if a member state has agreed, through a declaration, to accepting the competence of the Court for such human rights cases by individuals.²⁵¹ The future court will solve only economic disputes that arise between two or more member states.²⁵² In relation to the economic integration process in Africa, it is problematic that RECs, and natural and juristic persons are excluded from the jurisdiction of the new court. Furthermore, it appears that, conforming to Article 29 (2) of the Merger Protocol, the new Pan-African court will be the only court with jurisdiction over an economic integration treaty whose jurisdiction is not compulsory. In fact, the contracting parties of the AEC Treaty can decide whether they would prefer to be judged before the Pan-

²⁴⁶ Article 2 of the Merger Protocol establishes a single court named "African Court of Justice and Human Rights."

²⁴⁷ Article 25 (1) of the Statute of the African Court of Justice and Human Rights annexed to the Merger Protocol. Available: http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf. [2013, December 20].

²⁴⁸ African Union. 2013. List of Countries which have signed, ratified / acceded to the Protocol on the Statute of the African Court of Justice and Human Rights (Merger Protocol). Available: <http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf>. [2013, December 20].

²⁴⁹ Adebajo, A. & Paterson, M. (eds). 2012. *The AU at Ten: Problems, Progress, and Prospects*. International Colloquium Report. 30 – 31 August. Berlin, Germany. At 3. Cape Town, South Africa: Centre for Conflict Resolution. Available: http://www.ccr.org.za/images/pdfs/vol41_au_at_ten_6may2013.pdf. [2013, December 20].

²⁵⁰ Article 9 (1) of the Merger Protocol.

²⁵¹ Article 30 (f) of the Statute of the African Court of Justice and Human Rights annexed to the Merger Protocol read together with Article 8 (3) of the Protocol on the Statute of the African Court of Justice and Human Rights (Merger Protocol).

²⁵² Saurombe, A. 2012. An Analysis of Economic Integration in Africa with specific reference to the African Union and the African Economic Community. *SAPL*. 27:303 and 304.

African court or not, by ratifying the Merger Protocol or not. This means that member states can be part of the AEC, but not of its judiciary. Besides these two deficiencies in the Merger Protocol, there is another shortcoming worth mentioning. Although Article 46 (1) of the Merger Protocol commands that the decisions are binding on the parties, the provisions on the enforcement and sanctions of non-compliance in Article 46 (3) and (4) are very vague. Sanctions will be defined by the Assembly that consists of the African Heads of State and Government that might be reluctant to pronounce sanctions against a fellow “club member”. These deficiencies should be addressed and amended, because a Pan-African court like this will not have much impact on the regional integration process in Africa. The current Merger Protocol is not yet perfect as the deficiencies show. Moreover, a significant preoccupation with the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into one single court – the African Court of Justice and Human Rights – is that the Court of Justice of the AU was conceived to be the “AEC” Court. As such, the “AEC” Court would have been solely competent to deal with economic issues under the Abuja Treaty and to oversee the economic side of the integration process in Africa. Against this preoccupation that the merger of the two courts will entail a deviation from the economic aspects of Africa's integration process, it can be argued that the single court will at least have two distinct sections for general affairs and human rights cases, composed of eight judges each.²⁵³ Thus, there is a separate division for the AEC cases with competent judges on economic issues.

The first and foremost step is to let the court function, and this depends only on the African Heads of State and their willingness to accept their countries being judged by a supranational authority. Once it starts to function in whichever manner, it might improve and receive more competences through time.

4.3. Regional Level: Strengthening and Rationalising the RECs

The OAU was established before most of the RECs came into existence, and it had no legal structures for engaging with RECs or for even recognising them. The Abuja Treaty is already based on the assumption that the existing and future RECs will

²⁵³ Article 16 of the Statute of the African Court of Justice and Human Rights annexed to the Merger Protocol.

operate under the umbrella regime of the AEC, and that all RECs activities will be geared towards the realisation of the common objective – the establishment of the AEC.²⁵⁴ The AU has been established in a context in which RECs were a reality. However, it too has very few legal structures for an interface with them, and important opportunities for formalising the interface with the AU have not been taken.²⁵⁵ The drafting of the CAAU, for example, would have been an opportunity for rationalising the status of the complex landscape of the RECs and their difficult status vis-à-vis the AU.²⁵⁶ It would have been an opportunity to prohibit an AU member state from belonging to more than one REC, according to the principle “one state, one REC”.²⁵⁷ However, this chance was not taken. Only in 2006 did the AU decide on the moratorium regarding the recognition of new RECs²⁵⁸, thereby taking a first step towards the long overdue rationalisation of RECs. Until today, the task of rationalising the RECs and harmonising them with the AU remains to be undertaken.

In 2006, the ARIA II Report listed five different scenarios for rationalising the eight recognised RECs.²⁵⁹ These are maintaining the status quo, i. e. maintaining the current number of RECs; rationalisation through mergers and absorptions resulting in five RECs according to the regions as set out in the Abuja Treaty; rationalisation around rooted communities which means around the current configurations instead of the strict

²⁵⁴ Oppong, R. F. 2009. “Redefining the Relations between the African Union and the Regional Economic Communities in Africa” in: Bösl, A. & Erasmus, G. & Hartzenberg, T. & McCarthy, C. (eds). *Monitoring Regional Integration in Southern Africa Yearbook*. Stellenbosch, South Africa: TRALAC & Windhoek, Namibia: Konrad-Adenauer-Stiftung. At 6. Available: http://www.kas.de/wf/doc/kas_20303-1522-1-30.pdf?110125181230. [2013, December 30].

²⁵⁵ Mohammed, A. 2008. “Toward an Effective African Union: Participation, Institutions, and Leadership” in: Adejumbi, S. & Olukoshi, A. (eds). *The African Union and New Strategies for Development in Africa*. NY, USA: Cambria Press. At 82.

²⁵⁶ Mohammed, A. 2008. “Toward an Effective African Union: Participation, Institutions, and Leadership” in: Adejumbi, S. & Olukoshi, A. (eds). *The African Union and New Strategies for Development in Africa*. Amherst, NY, USA: Cambria Press. At 64.

²⁵⁷ Saurombe, A. 2012. An Analysis of Economic Integration in Africa with specific reference to the African Union and the African Economic Community. *SAPL*. 27:303; Oppong, R. F. 2011. *Legal Aspects of Economic Integration in Africa*. Cambridge: Cambridge University Press. At 78.

²⁵⁸ African Union. Decisions and Declarations – Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs) DOC.EX.CL/278 (IX). AU Doc. Assembly/AU/Dec. 111 – 132 (VII). Assembly of the African Union. Seventh Ordinary Session. 1 – 2 July 2006. Banjul, The Gambia. Available: http://www.au.int/en/sites/default/files/ASSEMBLY_FR_01_JULY_03_JULY_2006_AUC_SEVENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS.pdf. [2013, December 3].

²⁵⁹ United Nations Economic Commission for Africa. 2006. *Assessing Regional Integration in Africa II, Rationalising Regional Economic Communities*. At 115. Available: http://www.uneca.org/sites/default/files/publications/aria2_eng.pdf. [2013, December 20].

partition of regions in the Abuja Treaty²⁶⁰; rationalisation through division of labour; rationalisation through coordination and harmonisation of the strategies, programmes, sectorial projects and cooperation instruments of the institutions in each region. The report presents the scenarios in a neutral way without favouring one of the possibilities. Its aim is to serve as background information for the negotiations between the AU and the RECs, on the way forward in strengthening and accelerating the continent's integration.²⁶¹

In 2009, the AUC entrusted the firm Ideaconsult with the task of carrying out another study on the quantification of the rationalisation scenarios.²⁶² Ideaconsult identified the following four scenarios: the “status quo” scenario that consists in pursuing the ongoing integration process with its multiple and overlapping memberships; the “Abuja Treaty scenario option 1” that envisages the delineation of the states' memberships in accordance with the five regions as defined in the OAU Council of Ministers Resolution CM/464 (XXVI); the “Abuja Treaty scenario option 2”, also called the “anchorage communities” scenario, because it consists in the formation of the five regions with a more flexible interpretation of the text; the “accelerated convergence” scenario consisting in rationalising the RECs into two big supra-regional communities – the South-East Tripartite and the North-Centre-West Tripartite.²⁶³

At the end of 2013, a steady progress towards creating the AEC can be observed.²⁶⁴ The Tripartite initiative as well as the Continental Free Trade Agreement (CFTA) initiative show the efforts of the different integration actors to reach the objective of the Abuja Treaty. In 2008, the COMESA-EAC-SADC Tripartite Summit

²⁶⁰ According to the Report, the rooted communities should be based on the current configuration: ECCAS and ECOWAS for Central and West Africa, SADC for Southern Africa, COMESA for East Africa, and CEN-SAD for North Africa.

²⁶¹ United Nations Economic Commission for Africa. 2006. *Assessing Regional Integration in Africa II, Rationalising Regional Economic Communities*. At 146. Available: http://www.uneca.org/sites/default/files/publications/aria2_eng.pdf. [2013, December 20].

²⁶² African Union. 2009. *Study for the Quantification of Regional Economic Communities Rationalisation Scenarios*. At 2. Available: [http://ea.au.int/en/sites/default/files/Rationalisation%20study%20\(English\).2.pdf](http://ea.au.int/en/sites/default/files/Rationalisation%20study%20(English).2.pdf). [2013, December 20].

²⁶³ African Union. 2009. *Study for the Quantification of Regional Economic Communities Rationalisation Scenarios*. At ii. Available: [http://ea.au.int/en/sites/default/files/Rationalisation%20study%20\(English\).2.pdf](http://ea.au.int/en/sites/default/files/Rationalisation%20study%20(English).2.pdf). [2013, December 20].

²⁶⁴ United Nations Economic Commission for Africa. 2013. *Assessing Regional Integration in Africa VI, Harmonising Policies to Transform the Trading Environment*. Addis Ababa, Ethiopia: UNECA. At v. Available: http://www.uneca.org/sites/default/files/publications/aria_vi_english_full.pdf. [2013, December 20].

held in Kampala, Uganda, agreed on the need to harmonise trading arrangements among the three RECs and on the need for free movement of business persons, joint implementation of inter-regional infrastructure programmes and institutional arrangements.²⁶⁵ This Tripartite brings together 26 southern and eastern African countries that are members of the three RECs, with a combined gross domestic product of more than US\$630 billion.²⁶⁶ The initiative is described very positively by UNECA as “a key stepping stone towards the CFTA and thus the African Economic Community”²⁶⁷. In general, the Tripartite negotiations are seen as the right step towards rationalising the overlapping memberships of RECs and establishing the AEC timely.²⁶⁸ Since the first Tripartite is underway and makes good progress, the establishment of the second Tripartite comprising the North, Centre and West of the African continent would be very desirable.²⁶⁹ As implementation timeframe, it was suggested in 2009 that the second Tripartite take off in parallel to the first Tripartite in 2013. While the COMESA-EAC-SADC Tripartite should be an economic union by the end of 2016, the AMU-ECCAS-ECOWAS Tripartite should be one by the end of 2018.²⁷⁰ The following graph²⁷¹ shows the ideal outcome of the negotiations.

²⁶⁵ OECD & WTO. 2011. *Negotiating the COMESA-EAC-SADC FTA*. Available: <http://www.oecd.org/aidfortrade/47427206.pdf>. [2013, December 20].

²⁶⁶ United Nations Economic Commission for Africa. 2013. *Assessing Regional Integration in Africa VI, Harmonising Policies to Transform the Trading Environment*. Addis Ababa, Ethiopia: UNECA. At 1. Available: http://www.uneca.org/sites/default/files/publications/aria_vi_english_full.pdf. [2013, December 20].

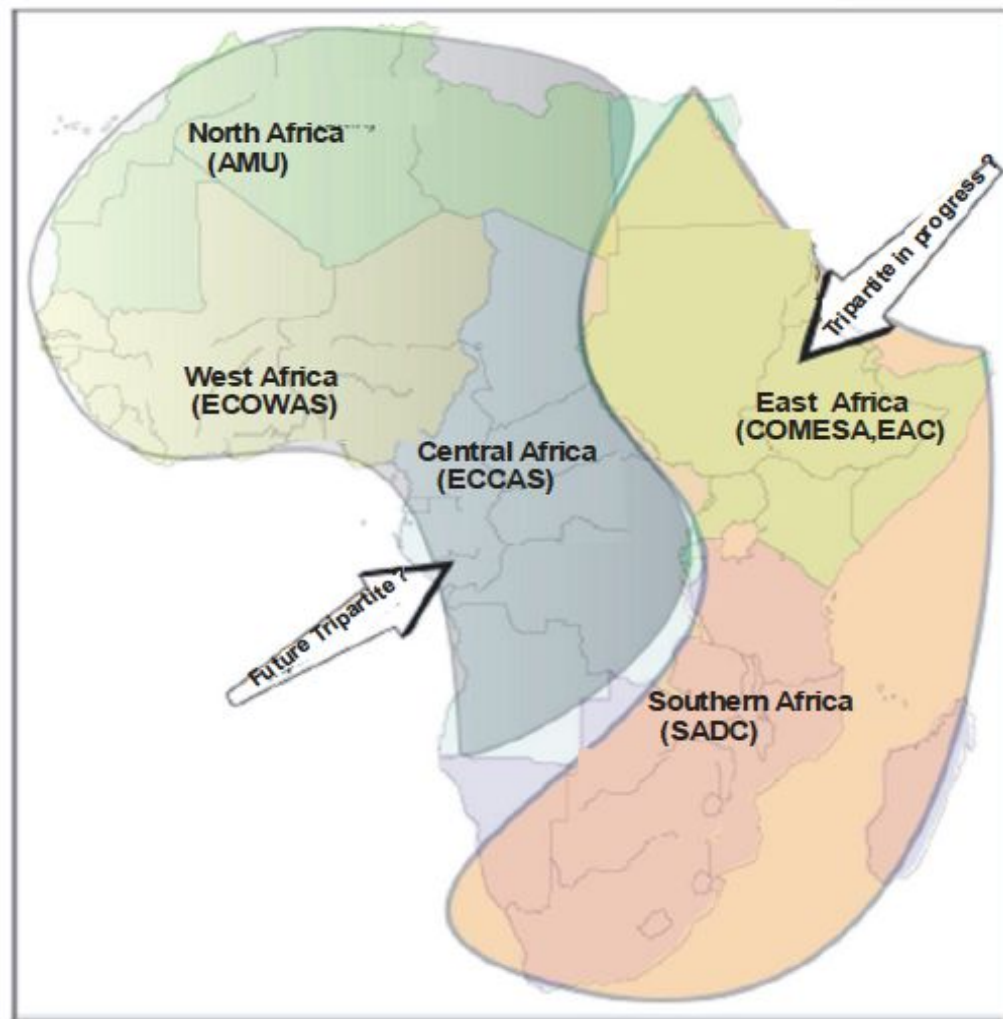
²⁶⁷ United Nations Economic Commission for Africa. 2013. *Assessing Regional Integration in Africa VI, Harmonising Policies to Transform the Trading Environment*. Addis Ababa, Ethiopia: UNECA. At 7. Available: http://www.uneca.org/sites/default/files/publications/aria_vi_english_full.pdf. [2013, December 20].

²⁶⁸ Forere, M. 2012. Is Discussion of the „United States of Africa“ Premature? Analysis of ECOWAS and SADC Integration Efforts. *Journal of African Law*. 56(1):44.

²⁶⁹ African Union. 2009. *Study for the Quantification of Regional Economic Communities Rationalisation Scenarios*. At v. Available: [http://ea.au.int/en/sites/default/files/Rationalisation%20study%20\(English\).2.pdf](http://ea.au.int/en/sites/default/files/Rationalisation%20study%20(English).2.pdf). [2013, December 20].

²⁷⁰ African Union. 2009. *Study for the Quantification of Regional Economic Communities Rationalisation Scenarios*. At 148–151. Available: [http://ea.au.int/en/sites/default/files/Rationalisation%20study%20\(English\).2.pdf](http://ea.au.int/en/sites/default/files/Rationalisation%20study%20(English).2.pdf). [2013, December 20].

²⁷¹ African Union. 2009. *Study for the Quantification of Regional Economic Communities Rationalisation Scenarios*. At 95. Available: [http://ea.au.int/en/sites/default/files/Rationalisation%20study%20\(English\).2.pdf](http://ea.au.int/en/sites/default/files/Rationalisation%20study%20(English).2.pdf). [2013, December 20].



In 2012, the Assembly of Heads of State and Government of the AU adopted a declaration²⁷² and a decision²⁷³ that reflected the strong political commitment of the African leadership to accelerate and deepen the continent's economic integration.²⁷⁴ In the decision and declaration, the African Heads of State and Government agreed on a roadmap for the establishment of a CFTA by the indicative date of 2017.²⁷⁵

²⁷² Assembly/AU/Dec. 394 (XVIII).

²⁷³ Assembly/AU/Decl. 1 (XVIII).

²⁷⁴ United Nations Economic Commission for Africa. 2013. *Assessing Regional Integration in Africa VI, Harmonising Policies to Transform the Trading Environment*. Addis Ababa, Ethiopia: UNECA. At 7. Available: http://www.uneca.org/sites/default/files/publications/aria_vi_english_full.pdf. [2013, December 20].

²⁷⁵ African Union Commission. 2013. *Status of Integration in Africa (SIA IV)*. At 156 and 157. Available: [http://www.au.int/en/sites/default/files/SIA%202013\(latest\)_En.pdf](http://www.au.int/en/sites/default/files/SIA%202013(latest)_En.pdf). [2013, December 3].

4.4 National level: Engaging Heads of State and Government and African Citizens

The national-level institutional capacities for implementing integration are weak.²⁷⁶ Governments and Heads of State are protective of their sovereignty, and many have an unstated interest in a weak AU. First, they do not give away competences easily; secondly, they lag behind in implementing provisions of the AU and the RECs at the national level. Leaders and citizens alike fear the creation of a democratic deficit when supranational entities are established. Thus, the popularisation of Africa's integration project is crucial.²⁷⁷ The Heads of State and Government have to be engaged more in the integration process and conform to the integration agenda for Africa. The African leadership as well as the African citizenship have to be informed about the integration project, because it will not work without their support and understanding for the need of the legal and economic reforms necessary to establish the AEC. The AU's Rationalisation Study of 2009 suggested to adopt a communication plan with the title “2011 – 2020: Decade of the Africa's Economic Emergence” to inform the civil society, including the private sector, governments and policy bodies within the RECs and the Tripartites, and development partners about Africa's integration process.²⁷⁸

4.5 Conclusion

In building the institutions of the AU, much can be learned and copied from other multilateral institutions like the EU. However, Africa should consider the benefits of its own perspective on the integration process. The way that Africa has chosen by following its two latest roadmaps – the decision and declaration to establish a CFTA by 2017 and the Tripartite initiative – is laudable and seems perfectly feasible. Moreover, the outcome of these rationalisation scenarios are in line with the Abuja Treaty which aims to establish a “Pan-African Economic and Monetary Union”²⁷⁹. Thus, somehow,

²⁷⁶ Mohammed, A. 2008. “Toward an Effective African Union: Participation, Institutions, and Leadership” in: Adejumobi, S. & Olukoshi, A. (eds). *The African Union and New Strategies for Development in Africa*. Amherst, NY, USA: Cambria Press. At 60.

²⁷⁷ Mohammed, A. 2008. “Toward an Effective African Union: Participation, Institutions, and Leadership” in: Adejumobi, S. & Olukoshi, A. (eds). *The African Union and New Strategies for Development in Africa*. Amherst, NY, USA: Cambria Press. At 62.

²⁷⁸ African Union. 2009. *Study for the Quantification of Regional Economic Communities Rationalisation Scenarios*. At 143. Available: [http://ea.au.int/en/sites/default/files/Rationalisation%20study%20\(English\).2.pdf](http://ea.au.int/en/sites/default/files/Rationalisation%20study%20(English).2.pdf). [2013, December 20].

²⁷⁹ Article 6 (2) of the AEC Treaty.

the RECs have to assimilate into the AEC, although the Treaty is silent in this regard. This process of merging and absorbing RECs is not without problems. As Oppong correctly questions, “what is the legal basis for assuming the RECs will eventually merge to form the African Economic Community”?²⁸⁰ The treaties of the RECs do not consider a merger, and their respective objectives do not reflect a merger either. The RECs were not created as only temporary arrangements, lasting just until the continent is ready for the final step of merging into the continental Pan-African economic community AEC.²⁸¹ Thus, it remains to be seen if the current RECs will really disappear as institutions through merger and absorption, or if the Tripartite and CFTA initiatives will just add another layer to the African institutional integration hierarchy, then consisting in African states – RECs – Macro-RECs and CFTA – AEC.²⁸²

The African blueprints seem doable, but now they have to be implemented. At this point, it is worth quoting Olivier who wrote to the point: “In the end, Africa's future is very much in its own hands. What the continent's new leadership has to prove is that 'African solutions to African problems' can really work.”²⁸³

²⁸⁰ Oppong, R. F. 2010. The African Union, African Economic Community and Africa's regional economic communities: Untangling a complex web. *African Journal of International and Comparative Law*. 18(1):93.

²⁸¹ Forere, M. 2012. Is Discussion of the „United States of Africa“ Premature? Analysis of ECOWAS and SADC Integration Efforts. *Journal of African Law*. 56(1):47.

²⁸² African Union. 2009. *Study for the Quantification of Regional Economic Communities Rationalisation Scenarios*. At iii and v. Available: [http://ea.au.int/en/sites/default/files/Rationalisation%20study%20\(English\).2.pdf](http://ea.au.int/en/sites/default/files/Rationalisation%20study%20(English).2.pdf). [2013, December 20].

²⁸³ Olivier, G. 2010. Regionalism in Africa: Cooperation without Integration. *Strategic Review for Southern Africa*. 32(2):40.

Chapter 5: Outlook

Africa lost in regionalism? From time to time, Africa seems to be lost in the translation of its ambitious treaties, protocols, declarations and numerous programmes. Timeframes and deadlines for the implementation of legal provisions governing the regional integration process in Africa are often missed. However, the establishment of the continent-wide economic community AEC calls for much patience and perseverance. As Rene N'Guetta Kouassi, Director of the Economic Affairs Department of the AU, correctly points out,

“any action by the African leaders on the matter should consist of laying foundations to make it possible for the future generations to give the successive added value whose sum total would, perhaps, represent the completion of this long-awaited African house. To wish to establish it through short-cuts would only create an “empty shell” which will in turn lead to constant renewal and indeed tremendous waste of resources.”²⁸⁴

Africa has indeed built up an excellent scaffolding to engage regional integration. Now, it is timely to continue this scaffolding in a more structured way and take it to the next level.

The next level will consist of the creation of the CFTA and the negotiations of the Tripartite initiatives leading towards the AEC. The envisaged CFTA will be one market with free movement of goods and services.²⁸⁵ Drafting the CFTA Protocol and setting up the legal framework for this grand trade agreement will contain several legal challenges. As one market, the CFTA needs one set of rules of origin. Research has to be conducted on the important issue of harmonisation of the rules of origin to anchor the CFTA. For this purpose, the rules of origin of the eight RECs have to be analysed and compared to find common solutions. Inspirations for such harmonisation can be taken from practices elsewhere in the world.²⁸⁶ The European and the North Atlantic Free

²⁸⁴ N'Guetta Kouassi, R. 2007. The Itinerary of the African Integration Process: An Overview of the Historical Landmarks. *African Integration Review*. 1(2):20.

²⁸⁵ United Nations Economic Commission for Africa. 2012. *Assessing Regional Integration in Africa V, Towards an African Continental Free Trade Area*. Addis Ababa, Ethiopia: UNECA. At 55. Available: http://www.uneca.org/sites/default/files/publications/aria5_print_uneca_fin_20_july_1.pdf. [2013, December 20].

²⁸⁶ United Nations Economic Commission for Africa. 2013. *Assessing Regional Integration in Africa VI*,

Trade Area (NAFTA) provisions should be consulted in this regard. It might be useful to analyse them and examine whether a transposition of the EU and NAFTA standards into the African context is appropriate.

The establishment of the CFTA and the Tripartite Initiatives will, if successful, result in a mega-continental economic agreement, ideally the AEC as set out in the Abuja Treaty. It seems that the AU and the African leadership have chosen to go this way for now. However, the critics against this path are still significant and advocate the strategy of variable geometry as practiced in some sectors of the EU nowadays.²⁸⁷ The principle of variable geometry generally means that one or more member states may remain on a permanent basis outside certain activities or practices being pursued within the framework of the Union²⁸⁸. Fagbayibo suggests to retain the current AU structure and create a framework through which democratic and economically strong African countries can integrate at a faster pace.²⁸⁹ Since not all members of the AU might be capable of following the ambitious projects and corresponding timetables towards the AEC, research about the possibilities to set up an AEC at two speeds with accession criteria for the avant-garde or pioneer group might be useful in future as well. According to Akonnor, "it is better to have a united empowered and independent Africa, comprising some African states rather than have a united but weak and dependent Africa, comprising all African states"²⁹⁰. Research should be conducted on how to strike a balance between the cherished goal of African unity on the one side, and deep and fast economic integration on the other.

Harmonising Policies to Transform the Trading Environment. Addis Ababa, Ethiopia: UNECA. At 13. Available: http://www.uneca.org/sites/default/files/publications/aria_vi_english_full.pdf. [2013, December 20].

²⁸⁷ Fagbayibo, B. 2011. Rethinking the African Integration Process: A Critical Politico-Legal Perspective on Building a Democratic African Union. *SAYIL*. 36:221.

²⁸⁸ Wyatt, D. & Dashwood, A. & Arnall, A. & others (eds). 2006. *European Union Law*. London, UK: Sweet & Maxwell. At 112.

²⁸⁹ Fagbayibo, B. 2011. Rethinking the African Integration Process: A Critical Politico-Legal Perspective on Building a Democratic African Union. *SAYIL*. 36:221.

²⁹⁰ Akonor, K. 2007. "Stuffing Old Wine in New Bottles: The Case of the African Union" in: Mazame, A. (ed). *Africa in the 21st Century: Towards a New Future*. New York, USA: Routledge. At 197.

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